

No. 11964

United States
Circuit Court of Appeals
for the Ninth Circuit

FRANK L. CHRISTENSEN,

Appellant,

vs.

CHARLES LEE TROTTER and JOHN S.
RAYBURN,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

AUG 20 1948

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

STRUCKMEYER AND STRUCKMEYER,
207 Luhrs Building,
Phoenix, Arizona,
Attorneys for Appellant.

MORGAN AND LOCKLEAR,
Luhrs Building,
Phoenix, Arizona,
Attorneys for Appellee. [3*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the District of Arizona

No. Civ. 111 Pret.

JOHN S. RAYBURN,

Plaintiff,

vs.

LIGHTNING DELIVERY COMPANY, a co-partnership; FRANK L. CHRISTENSEN, doing business as "LIGHTNING DELIVERY COMPANY"; P. J. FRANCIS, doing business as "LIGHTNING DELIVERY COMPANY"; FIRST DOE and SECOND DOE,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendants and each of them and for cause of action alleges:

I.

That plaintiff is ignorant of the true names and capacities whether individual, corporate, associate or otherwise, of defendants First Doe and Second Doe and therefore sues said defendants by such fictitious names, and will pray leave of Court to amend this complaint to show their true names and capacities when same have been ascertained.

II.

That defendants and each of them are now, and were at all times herein mentioned, residents and citizens of the State of Arizona.

III.

That at all times herein mentioned plaintiff was and now is a resident and citizen of the State of California. [4]

IV.

That at all times herein mentioned defendant Frank L. Christensen was an individual doing business as Lightning Delivery Company in the State of Arizona.

V.

That at all times herein mentioned defendant P. J. Francis was an individual doing business as Lightning Delivery Company in the State of Arizona.

VI.

That the amount in controversy, exclusive of costs and interest, is in excess of the sum of Three Thousand (\$3,000.00) Dollars.

VII.

That on or about the 24th day of March, 1944, at or about the hour of 1:20 o'clock a.m. thereof, plaintiff was employed by The Atchison, Topeka and Santa Fe Railway Company as an engineer working on one of the locomotive engines of said The Atchison, Topeka and Santa Fe Railway Company which was then and there pulling a train over the mainline railroad tracks of said The Atchison, Topeka and Santa Fe Railway Company in a west-bound direction approximately opposite the station of The Atchison, Topeka and Santa Fe Railway Company at Kingman, Mojave County, Arizona.

VIII.

That at said time and place a certain truck owned by defendants and each of them and bearing the name Lightning Delivery was so carelessly and negligently parked by defendants on the roadway immediately above the said The Atchison, Topeka and Santa Fe Railway Company station at Kingman that it was suddenly caused to run away driverless and to run upon said roadway onto the said railroad tracks and to collide with the said locomotive engine, thereby directly and proximately causing said locomotive engine to become derailed and plaintiff thereby sustained the injuries [5] hereinafter enumerated: fractures of both wrists; contusions of the right hip; fracture of the greater trochanter of the right femur; multiple bruises and abrasions about the face, chest and right heel; extreme pain and suffering and a severe shock to his nervous system.

IX.

That at the time of the happening of the aforesaid accident plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately Six Hundred (\$600.00) Dollars per month; that by reason of the facts hereinabove alleged and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future, rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's dam-

age in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of Court to insert said sum as the reasonable value of said loss of services. That the reasonable value of loss of wages is \$13,000.00.

X.

That as a direct and proximate result of the carelessness and negligence of defendants, as aforesaid, plaintiff has been generally damaged in the sum of Fifty Thousand (\$50,000.00) Dollars.

Wherefore, plaintiff prays judgment against defendants and each of them in the sum of Fifty Thousand (\$50,000.00) Dollars, together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

J. H. MORGAN,
Attorney for Plaintiff.

HILDEBRAND, BILLS &
McLEOD,
Of Counsel.

[Endorsed]: Filed Sept. 14, 1944. [6]

In the District Court of the United States
for the District of Arizona

No. Civ. 112 Prc.

CHARLES LEE TROTTER,

Plaintiff,

vs.

LIGHTNING DELIVERY COMPANY, a co-part-
nership; FRANK L. CHRISTENSEN, doing
business as "LIGHTNING DELIVERY COM-
PANY"; P. J. FRANCIS, doing business as
"LIGHTNING DELIVERY COMPANY";
FIRST DOE and SECOND DOE,
Defendants.

COMPLAINT FOR DAMAGES

IX.

That at the time of the happening of the afore-
said accident plaintiff was a strong and able bodied
man capable of earning and earning the sum of
approximately Four Hundred, Fifty (\$450.00) Dol-
lars per month; that by reason of the facts herein-
above alleged and the injuries proximately caused
plaintiff thereby, plaintiff is now, and will be for
an indefinite period of time in the future, rendered
incapable of performing his usual work or services
or any work or services whatsoever, all to plaintiff's
damage in an amount as yet unascertainable, and
that when said sum is ascertained plaintiff will pray
leave of Court to insert said sum as the reasonable
value of said loss of services. That the reasonable
value of loss of wages is \$7,350.00.

X.

That as a direct and proximate result of the carelessness and negligence of defendants and each of them, as aforesaid, plaintiff has been generally damaged in the sum of Thirty Thousand (\$30,000.00) Dollars.

Wherefore, Plaintiff prays judgment against defendants and each of them in the sum of Thirty Thousand (\$30,000.00) Dollars, together with such special damages as may be hereafter ascertained, and [9] for his costs of suit incurred herein.

J. H. MORGAN,

Attorney for Plaintiff.

HILDEBRAND, BILLS &

McLEOD,

Of Counsel.

[Endorsed]: Filed Sept. 14, 1944. [10]

[Title of District Court and Cause No. 111.]

ANSWER

Come now the defendants, Frank L. Christensen and P. J. Francis, and answering the complaint herein admit, deny, and allege:

I.

The defendants admit Paragraphs II, III, IV and VI of the complaint, and deny Paragraph V of the complaint.

II.

The defendants, further answering the complaint, allege that they have no knowledge of the facts stated in Paragraph VII of the complaint, and therefore neither admit nor deny the same.

III.

Defendants, further answering the complaint, deny Paragraphs VIII, IX and X of the complaint.

IV.

And the defendants, further answering the complaint and as an affirmative defense thereto, allege, that if [11] any such injuries were sustained by the plaintiff, such injuries were sustained by the plaintiff through his own negligence, which negligence proximately caused or proximately contributed to the sustaining of such injuries.

V.

Further answering the plaintiff's complaint and as an affirmative defense thereto, the defendants allege that the complaint fails to state facts sufficient upon which relief can be granted.

Wherefore, these defendants pray that the plaintiff take nothing by his complaint and for their costs herein sustained.

STRUCKMEYER &

STRUCKMEYER,

By F. C. STRUCKMEYER,

Attorneys for Defendants.

Service of this pleading made by depositing a copy in the United States Post Office, addressed to J. H. Morgan, attorney for the plaintiff, at Box 27, Prescott, Arizona, on the 29th day of September, 1944.

STRUCKMEYER &

STRUCKMEYER,

By F. C. STRUCKMEYER,

Attorneys for Defendants.

[Endorsed]: Filed Sept. 30, 1944. [12]

(Title of Court)

MINUTE ENTRY OF THURSDAY, JULY
19, 1945

(Prescott Division)

March 1945 Term, at Prescott.

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Causes No. 111, 112]

E. C. Locklear, Esquire, is present on behalf of the plaintiff. James A. Struckmeyer, Esquire, is present on behalf of the defendants.

E. C. Locklear, Esquire, moves to permit the plaintiff to amend his complaint by adding the words, "and citizen" in line 32 on page 1 thereof after the word, "resident", and by adding the words, "and citizens" after the word, "residents" in line 29 on said page 1. Counsel for the defendants objects to said amendment, and

It is ordered that said amendment be and it is allowed, and

It is further ordered that the Clerk make such amendment by interlineation.

Said counsel now stipulate that this case may be transferred to the Phoenix calendar and that this case may be tried at Phoenix, Arizona, and

It is ordered that this case be and it is transferred to the Phoenix calendar for trial setting.

Said counsel now stipulate that the trial hereof shall be before a Jury. [17]

(Title of Court)

MINUTE ENTRY OF MONDAY,
OCTOBER 8, 1945

(Prescott Division)

October 1945 Term, at Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

CIV-111

JOHN S. RAYBURN,

Plaintiff,

vs.

LIGHTNING DELIVERY COMPANY, et al.,
Defendants.

CIV-112

CHARLES LEE TROTTER,

Plaintiff,

vs.

LIGHTNING DELIVERY COMPANY, et al.,
Defendant.

CIV-115

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, etc.,

Defendant.

David Jones, Esquire, is present on behalf of
the plaintiff, and states he is to be associated with

counsel for plaintiff herein; and that remaining counsel for the respective parties herein have consented to a consolidation of the cases, Civil-111 Prescott, Civil-112 Prescott and Civ-115 Prescott for trial before a Jury in January of 1946.

It is ordered that these cases be and they are consolidated for trial before a Jury and

It is further ordered that these cases be and they are set for trial on Tuesday, January 15, 1946, at the hour of ten o'clock a.m., at Phoenix, Arizona.

(Title of Court)

MINUTE ENTRY OF TUESDAY,
DECEMBER 30, 1947

(Prescott Division)

October 1947 term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Causes No. 111, 112.]

This case comes on regularly for trial this day. The parties herein are present with their counsel. Joseph H. Morgan, Esquire, and Donald Morgan, Esquire, appear as counsel for the plaintiff. F. C. Struckmeyer, Esquire, and James Struckmeyer, Esquire, appear as counsel for the defendants. Louis L. Billar is present as official court reporter.

On motion of Joseph H. Morgan, Esquire,

It is ordered that E. W. Brobst, Esquire, be en-

tered as associate counsel for the plaintiffs, and be admitted specially to practice herein.

There being but twenty-three jurors in attendance, counsel for the defendants waives one peremptory challenge. Examination of jurors on voir dire is now had and Arthur H. Brooks is excused for cause. Counsel for the plaintiffs waives one peremptory challenge.

A lawful jury of twelve men is now duly empaneled and sworn to try this case.

Thereupon, it is ordered that all Jurors not empaneled in the trial of this case be excused until further order.

Counsel for the plaintiffs now reads the complaints to the jury and counsel for the defendants now reads the answers to the jury.

PLAINTIFFS' CASE

Dewey A. Pennington is now sworn and examined on behalf of the plaintiffs.

Frank L. Christensen is now sworn and cross-examined under statute.

On motion of Joseph H. Morgan, Esquire,

It is ordered that each of these cases be and they are dismissed as to all defendants except Frank L. Christensen doing business as Lightning Delivery Company.

The following plaintiff's witnesses are now sworn and examined: Thomas W. Atkins, Sam Marbell.

Plaintiffs' exhibits 1, 4, 5 and 6, each a photograph, are now admitted in evidence. [23]

And thereupon, at the hour of twelve o'clock

noon, it is ordered that the further trial of this case be continued until two o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present pursuant to recess further proceedings of trial are had as follows:

PLAINTIFFS' CASE CONTINUED

Charles Lee Trotter is now sworn and examined in his own behalf.

Counsel for the defendant makes offer of proof and defendant's Exhibit A is marked for identification. Counsel for the plaintiffs objects thereto, and

It is ordered that said objection be and it is sustained.

John S. Rayburn is now sworn and examined in his own behalf.

Counsel for the defendant offers Defendant's Exhibit B in evidence. Counsel for plaintiffs objects thereto, and

It is ordered that said objection be and it is sustained.

Joseph H. Morgan, Esquire, now moves to amend complaint in Civ-112 by interlineation in paragraph 9 by adding "\$450.00 per month" in lieu of \$225.00 to conform with proof and by adding "That the

reasonable value of loss of wages is \$7,350.00"; and further moves for leave to amend complaint in Civ-111 by interlineation of paragraph 9, by adding "approximately \$600" in lieu of \$500.00, to conform with proof and by adding "That the reasonable value of loss of wages is \$13,000.00", and

It is ordered that said Motions for leave to amend Complaint be and they are granted.

The deposition of Dr. Ivo J. Lopizich is now admitted and read in evidence.

Whereupon the plaintiffs rest.

Counsel for the defendant now moves to dismiss on account of insufficient evidence, and

It is ordered that said Motion to Dismiss be and it is denied.

DEFENDANT'S CASE

Charles Dryden is now sworn and examined on behalf of the defendant.

Defendant's exhibit C, map, is now admitted in evidence.

And thereupon, at the hour of 4:25 o'clock p.m., it is ordered that [24] the further trial of this case be continued until ten o'clock a.m., Wednesday, December 31, 1947, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused. [25]

(Title of Court)

MINUTE ENTRY OF WEDNESDAY,
DECEMBER 31, 1947

(Prescott Division)

October 1947 Term, at Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

[Title of Causes No. 111, 112.]

The jury, and all members thereof, the parties
and counsel are present pursuant to recess and fur-
ther proceedings of trial are had as follows:

DEFENDANT'S CASE CONTINUED

Conda E. Wilson is now sworn and examined on
behalf of the defendant.

Frank L. Christensen, heretofore sworn, is now
called and examined in his own behalf.

Plaintiffs' exhibit 9, photograph, is now admitted
in evidence.

The following defendant's witnesses are now
sworn and examined: Leonard J. Gore, Elmer Hub-
bard, Sidney Fisher.

Portions of depositions of Charles Lee Trotter
and John S. Rayburn are now read in evidence.

Counsel for defendant now renews offer of de-
fendant's exhibits A and B for identification, in
evidence, and

It is ordered that plaintiffs' objection be and it
is sustained.

And the defendant rests.

REBUTTAL

John S. Rayburn is now recalled and further examined in his own behalf.

Sam Marbell is now recalled and further examined on behalf of the plaintiffs.

Both sides rest.

And thereupon, at the hour of 11:50 o'clock a.m., it is ordered that the further trial of this case be continued until ten o'clock a.m., Friday, January 2, 1948, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused. [26]

(Title of Court)

MINUTE ENTRY OF FRIDAY,
JANUARY 2, 1948

(Prescott Division)

October 1947 Term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Causes No. 111, 112.]

The jury, and all members thereof, the parties and counsel being present pursuant to recess, further proceedings of trial are had as follows:

Counsel for the defendant now moves for directed verdict, and

It is ordered that said Motion be and it is denied.

All the evidence being in, the case is argued by respective counsel to the jury.

And thereupon, at the hour of 12:00 o'clock noon,

it is ordered that the further trial of this case be continued to the hour of two o'clock p.m., this date, to which time the jury, being first duly admonished, the parties and counsel are excused.

Subsequently, at the hour of two o'clock p.m., the jury and all members thereof, the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

The case is now further argued by counsel for the plaintiff to the jury.

Whereupon, the Court duly instructs the jury and said jury retire at the hour of 2:45 o'clock p.m. in charge of a sworn bailiff to consider of their verdicts. Counsel for defendants object to the court's giving of plaintiffs' requested instructions 5, 6 and 8 and to the court's refusal to give defendant's requested instruction No. 2.

Subsequently, the parties and counsel being present, the Jury return in a body into open Court at the hour of 4:15 o'clock p.m., and all members thereof being present, are asked if they have agreed upon a verdict. Whereupon the Foreman reports that they have agreed and presents the following verdicts, to-wit:

Civ-111 Prescott

JOHN S. RAYBURN,

Plaintiff,

Against

FRANK L. CHRISTENSEN, doing business as
"Lightning Delivery Company,"

Defendant,

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, John S. Rayburn, and assess his damages at \$1,000.00.

W. H. GREEN,
Foreman. [27]

Civ-112 Prescott

CHARLES LEE TROTTER,

Plaintiff,

Against

FRANK L. CHRISTENSEN, doing business as
“Lightning Delivery Company,”

Defendant,

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff, Charles Lee Trotter, and assess his damages at \$7,500.00.

W. H. GREEN,
Foreman.

The verdicts are read as recorded and the jury is discharged from the further consideration of this case and until further order.

It is ordered that plaintiffs have judgment on the verdicts. [28]

[Title of District Court and Causes No. 111, 112]

CONSOLIDATED FOR TRIAL
DEFENDANT'S REQUESTED
INSTRUCTIONS

Comes now the defendant, by his attorneys of record, and moves the court to instruct the jury as follows:

STRUCKMEYER &
STRUCKMEYER,

By

Attorneys for Defendant. [29]

D-I.

You are instructed to return a verdict in favor of the defendant.

Given.....

Refused: Dave W. Ling.

Given as modified.....

D-II.

You are instructed that the law presumes that the driver of an automobile was operating the automobile legally and lawfully. The fact of an accident is in itself no proof of negligence and in the absence of evidence to the contrary you must presume that the defendant here was free from negligence. The burden of proof is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent in the manner alleged in the complaint, and unless you believe from a preponderance of the evidence that the defendant

was negligent in the manner alleged, then you must return a verdict in favor of the defendant.

Given

Refused: Dave W. Ling.

Given as modified [30]

D-III.

If you believe that from the evidence that the driver of the truck in question exercised ordinary and reasonable care in parking the truck and that he took such steps as an ordinary and reasonably prudent person would take to safe guard the said truck against moving, then in that event you shall return a verdict for the defendants.

Given: Dave W. Ling.

Refused

Given as modified

D-IV.

I further charge you that if the defendant, acting through the driver of his truck, exercised reasonable and ordinary care as I heretofore defined to you, in the parking of the truck, and though said truck thereafter, through external cause not shown by the evidence, came to rest on the track of the Santa Fe Railway Company, then it is your duty to find a verdict for the defendant. In other words, it is not the duty of the defendants to explain or show the reason why their truck came upon the track of the Santa Fe Railways Company, but it is the duty of the plaintiffs to prove by a preponderance of the evidence that said truck came upon the

track of the Santa Fe Railway Company through the negligence of the defendant.

Given: Dave W. Ling.

Refused

Given as modified

[Endorsed]: Filed Jan. 2, 1948. [31]

(Title of Court)

MINUTE ENTRY OF TUESDAY,
JANUARY 6, 1948
(Prescott Division)

October 1947 Term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause No. 111.]

It is ordered that the form of judgment presented by Joseph Morgan, Esquire, counsel for the plaintiff, approved as to form by counsel for the defendant be approved, entered, filed and spread upon the minutes as the judgment herein as follows:

CIV-111

JOHN S. RAYBURN,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, doing business as
"LIGHTNING DELIVERY COMPANY,"
Defendant.

JUDGMENT

This action came on regularly for trial on Decem-

ber 30, 1947. The parties appeared by their attorneys, Messrs. J. H. Morgan, D. J. Morgan and D. W. Brobst, counsel for the plaintiff, Messrs. F. C. Struckmeyer and James A. Struckmeyer, for defendant. A jury of twelve persons was regularly impaneled and sworn to try the action. Witnesses on the part of plaintiff and defendant were sworn and examined. The trial continued on the 31st day of December, 1947. After hearing the evidence, the arguments of counsel and instructions of the Court on January 2, 1948, the jury retired to consider their verdict, and on said day returned into court, and rendered their verdict in favor of plaintiff and against the defendant for Ten Thousand Dollars (\$10,000.00). Thereupon, the Court ordered judgment in accordance with said verdict, together with costs, to be entered on formal written judgment.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said John S. Rayburn, plaintiff, have and recover from said Frank L. Christensen, defendant, the said sum of Ten Thousand Dollars (\$10,000.00), together with the costs and disbursements of this [32] action, taxed and allowed at the sum of One Hundred Fifty-five and 73/100----- Dollars (\$153.73), with interest on the amounts so

recovered at the rate of six per cent (6%) per annum from this date until paid.

Dated this 6th day of January, 1948.

Approved as to form January . ., 1948.

STRUCKMEYER &
STRUCKMEYER,

By James A. STRUCKMEYER,
Attorneys for Defendant.

or

Service accepted this day of January, 1948.

STRUCKMEYER &
STRUCKMEYER,

By
Attorneys for Defendant.

The foregoing form of judgment is hereby approved, and the Clerk directed to enter the same.

Dated January 6, 1948.

DAVE W. LING,
District Judge.

[Endorsed]: Filed and entered in Civil Docket
Jan. 6, 1948, Wm. H. Loveless, Clerk.

[Title of Cause No. 112.]

It is ordered that the form of judgment presented by Joseph Morgan, Esquire, counsel for the plaintiff, and approved as to form by counsel for the

defendant be approved, entered, filed and spread upon the minutes as the judgment herein as follows:

CIV-112

CHARLES LEE TROTTER,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, doing business as
"LIGHTNING DELIVERY COMPANY,"
Defendant.

JUDGMENT

This action came on regularly for trial on December 30, 1947. The parties appeared by their attorneys, Messrs. J. H. Morgan, D. J. Morgan and D. W. Brobst, counsel for the plaintiff, Messrs. F. C. Struckmeyer and James A. Struckmeyer, for defendant. A jury of twelve persons was regularly impaneled and sworn to try the action. Witnesses on the part of plaintiff and defendant were sworn and examined. The trial continued on the 31st day of [33] December, 1947. After hearing the evidence, the arguments of counsel and instructions of the Court on January 2, 1948, the jury retired to consider their verdict, and on said day returned into court, and rendered their verdict in favor of plaintiff and against the defendant for Seven Thousand Five Hundred Dollars (\$7,500.00). Thereupon, the Court ordered judgment in accordance with said verdict, together with costs, to be entered on formal written judgment.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said Charles Lee Trotter, plaintiff, have and recover from said Frank L. Christensen, defendant, the said sum of Seven Thousand Five Hundred Dollars (\$7,500.00), together with the costs and disbursements of this action, taxed and allowed at the sum of One Hundred Fifty-two and 17/100 Dollars (\$152.17), with interest on the amounts so recovered at the rate of six per cent (6%) per annum from this date until paid.

Dated this 6th day of January, 1948.

Approved as to form January . . . , 1948.

STRUCKMEYER &
STRUCKMEYER,

By JAMES A. STRUCKMEYER,
Attorneys for Defendant.

Service accepted this . . . day of January, 1948.

STRUCKMEYER &
STRUCKMEYER,

By
Attorneys for Defendant.

The foregoing form of judgment is hereby approved, and the Clerk directed to enter the same.

Dated January 6, 1948.

DAVE W. LING,
District Judge.

[Endorsed]: Filed and entered in Civil Docket
Jan. 6, 1948, Wm. H. Loveless, Clerk.[34]

[Title of District Court and Cause No. 111.]

CIVIL DOCKET

Proceedings

Date

1948

Jan. 6-16—Enter and file and docket judgment for pltf. against deft. Frank L. Christensen in the sum of \$10,000.00 plus costs in sum of \$155.73; and int. on amounts recovered at rate of 6% per annum from 1/6/48 until paid.

[Title of Cause No. 112.]

CIVIL DOCKET

Proceedings

1948

Date

Jan. 6-16—Enter and file and docket judgment for pltf. against deft. Frank L. Christensen in sum of \$7,500.00 plus costs in sum \$152.17; and int. on amounts recovered at rate of 6% per annum until paid.

[Title of District Court and Cause No. 111.]

MOTION FOR NEW TRIAL

Comes Now the defendant and moves the court that a new trial be granted as to the issues in the

above entitled and numbered cause upon the following grounds and for the following reasons:

1. The court erred prejudicially in refusing to admit defendant's Exhibit "A" marked for identification.

2. The court erred prejudicially in giving of certain instructions over the objections of the defendant.

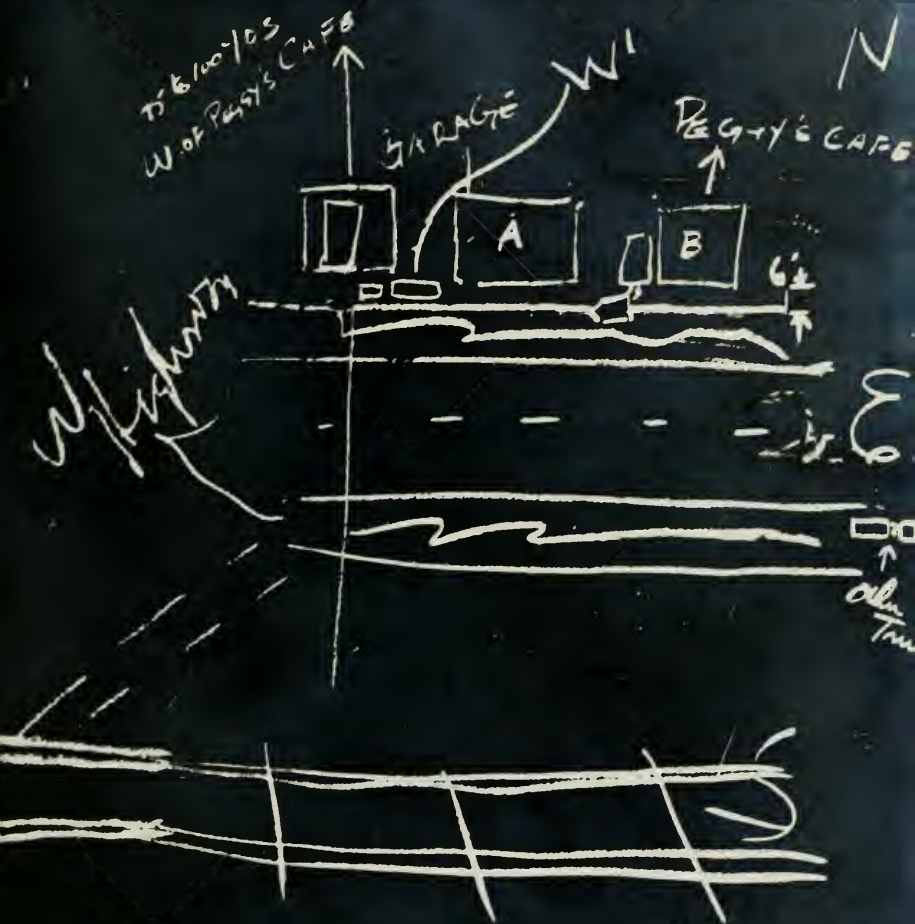
3. The court erred in instructing the jury that the jury must apply the so-called "res ipsa loquitur" doctrine, and in submitting the matter to the jury on the said doctrine.

4. The court erred prejudicially in denying the defendant's motion for a directed verdict made at the close of the plaintiff's case and renewed at the close of all the evidence.

Wherefore, the defendant prays the foregoing motion be granted.

STRUCKMEYER &
STRUCKMEYER,

By JAMES A. STRUCKMEYER,
Attorneys for Defendant. [40]



ENCLOSURE

JAN 12 1942

W. H. LOVELESS, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY GERTRUDE I. BITTING
DEPUTY CLERK

[Title of District Court and Cause No. 111.]

MOTION FOR JUDGMENT

Comes now the defendant in the above entitled matter and cause, and moves that the court do make and enter its order setting aside the judgment herein and granting judgment in favor of defendant notwithstanding the verdict of the jury on the ground and for the reason that the evidence adduced by the plaintiff does not show any negligence upon the part of the defendant which proximately caused the injury of which the plaintiff complains.

Wherefore, defendant prays the foregoing motion be granted.

STRUCKMEYER &
STRUCKMEYER,

By JAMES A. STRUCKMEYER,
Attorneys for Defendant.

Received copy this 12th day of January, 1948.

MORGAN & LOCKLEAR,

By J. H. MORGAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 12, 1948. [43]

[Title of Court.]

MINUTE ENTRY OF
MONDAY, MARCH 15, 1948

(Prescott Division)

October 1947 Term. At Phoenix.

[Titles of Causes Nos. 111, 112.]

Motion of the defendant Frank L. Christensen for New Trial and Motion for Judgment come on regularly for hearing this date. J. H. Morgan, Esquire, appears for the plaintiff. Fred C. Struckmeyer, Esquire, and James Struckmeyer, Esquire, appear for the defendant.

On motion of counsel for the defendant,

It Is Ordered that the defendant be allowed to amend Motion for New Trial by attaching thereto a photostatic copy of blackboard diagram made during the trial. Said Motions are argued and submitted.

It Is Ordered that the defendant be allowed twenty days within which to file Memorandum and the plaintiff five days thereafter within which to answer. [48]

[Title of Court.]

MINUTE ENTRY OF
WEDNESDAY, MAY 5, 1948

(Prescott Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District
Judge, presiding.

[Titles of Causes Nos. 111, 112.]

Defendant's Motion for New Trial and Motion
for Judgment having been heretofore argued and
submitted,

It Is Ordered that said Motion for New Trial
and Motion for Judgment be and they are denied.

(Notation of order entered in Civil Docket May
5, 1948.) [49]

[Title of District Court and Causes Nos. 111, 112.]

STIPULATION

It Is Stipulated that the above entitled actions
may be consolidated for purposes of appeal.

MORGAN & LOCKLEAR,

By J. H. MORGAN,

Attorneys for Plaintiffs.

STRUCKMEYER &

STRUCKMEYER,

By JAMES A. STRUCKMEYER,

Attorneys for Defendant.

[Endorsed]: Filed May 25, 1948. [50]

[Title of District Court and Causes Nos. 111, 112.]

NOTICE OF APPEAL

Notice is hereby given that Frank L. Christensen, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 6th day of January, 1948, and from the order of the 5th day of May, 1948, denying defendant's Motion for a New Trial and Motion for Judgment notwithstanding the Verdict.

STRUCKMEYER &
STRUCKMEYER,

By /s/ JAMES A. STRUCKMEYER,
Attorneys for Appellant
Frank L. Christensen.

[Endorsed]: Filed May 25, 1948. [51]

[Title of Court.]

MINUTE ENTRY OF THURSDAY, MAY 27, 1948 (Prescott Division)

April 1948 Term. At Phoenix.

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Causes Nos. 111, 112.]

It Is Ordered that Appellant's Supersedeas Bond on Appeal, with American Surety Company as surety thereon, be and it is approved. [56]

[Title of District Court and Causes Nos. 111, 112.]

ORDER FOR TRANSMITTAL OF CERTAIN
ORIGINAL EXHIBITS AND REPORTER'S
TRANSCRIPT TO CIRCUIT COURT OF
APPEALS

Counsel for the appellants having designated that all exhibits introduced in evidence or marked for identification herein, including the photograph of blackboard on which various witnesses diagrammed the scene of the accident, be contained in the transcript of record on appeal herein, and it appearing to the Court that the photograph of blackboard diagram is included in the record on appeal herein as a part of the defendant's motion for new trial herein,

It Is Ordered that the Clerk of this Court transmit the following original exhibits herein to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal in these cases:

Plaintiff's Exhibit 1—photograph (in evidence).

Plaintiff's Exhibit 4—photograph (in evidence).

Plaintiff's Exhibit 5—photograph (in evidence).

Plaintiff's Exhibit 6—photograph (in evidence).

Plaintiff's Exhibit 9—photograph (in evidence).

Defendant's Exhibit A—Certified copy of Complaint (marked for identification).

Defendant's Exhibit B—Certified copy of Complaint (marked for identification).

Defendant's Exhibit C—Map (in evidence).

It Is Further Ordered that the original of Reporter's Transcript herein be transmitted to said circuit court of appeals as a part of the record on appeal herein.

Dated at Phoenix, Arizona, this 28th day of June, 1948.

DAVE W. LING,
United States District Judge.

[Endorsed:] Filed June 28, 1948. [57]

[Title of District Court and Causes Nos. 111, 112.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes now Frank L. Christensen and hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Complaint, Civil Cause No. 111 Pct.
2. Complaint, Civil Cause No. 112 Pct. abbreviated by omission of allegations duplicitous to those of Civil Cause No. 111. (Included: Paragraphs IX, X and prayer.)
3. Answer of defendant Frank L. Christensen, Civil Cause No. 111. (Note: Answer in Civil Cause No. 112 omitted as duplicitous.)
4. Requested instructions by defendant.
5. Judgment in Civil Cause No. 111.

6. Judgment in Civil Cause No. 112 abbreviated by omission of duplicitous items.

7. Motion for New Trial in Civil Cause No. 111. (Note: Motion for New Trial in Civil Cause No. 112 omitted as duplicitas.)

8. Motion for Judgment notwithstanding the Verdict in Civil Cause No. 111. (Note: Motion for Judgment notwithstanding the Verdict in Civil Cause No. 112 omitted as duplicitous.)

9. All Minute Entries and Orders.

10. All Exhibits marked for identification or introduced into evidence including photograph of blackboard on which various witnesses diagrammed the scene of the accident.

11. Notice of appeal.

12. Stipulation of consolidation of Civil Causes Nos. 111 and 112.

13. Supersedeas Bond on Appeal in Civil Causes Nos. 111 and 112.

14. Reporter's Transcript, including charge to jury.

15. Designation of Contents of Record on Appeal.

Defendant Frank L. Christensen requests that the foregoing portions of the record be forwarded

to the United States Circuit Court of Appeals for the Ninth Circuit as required by law.

Dated this 4th day of June, 1948.

STRUCKMEYER &
STRUCKMEYER,

By F. C. STRUCKMEYER,
Attorneys for Frank L. Christensen.

Received copy of the foregoing designation this 4th day of June, 1948.

MORGAN & LOCKLEAR,

By J. H. MORGAN,
Attorneys for Plaintiffs.

Approved:

MORGAN & LOCKLEAR,
By J. H. MORGAN,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 4, 1948. [59]

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

..

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of John S. Rayburn, Plaintiff, vs. Frank L. Christen-

sen, et al., Defendants, numbered Civ.-111 Prescott, on the docket of said Court, and Charles Lee Trotter, Plaintiff, vs. Frank L. Christensen, et al., Defendants, numbered Civ.-112 Prescott, on the docket of said Court.

I further certify that the attached pages numbered 1 to 59, inclusive, contain a full, true and correct transcript of the proceedings of said causes and all the papers filed therein, together with the endorsement of filing thereon, called for and designated in the Designation filed in each of said causes and made a part of the transcript attached hereto, as the same appear from the originals of record on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid, with the exception of the Reporter's Transcript, Plaintiff's Exhibits 1, 4, 5, 6 and 9, and Defendant's Exhibits A, B and C, the originals of which are transmitted herewith pursuant to order of the Court and made a part of this record on appeal.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$16.20 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 30th day of June, 1948.

[Seal] /s/ WM. H. LOVELESS,
Clerk. [60]

In the District Court of the United States
for the District of Arizona

No. Civil 111 Prescott

JOHN S. RAYBURN,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, et al.,

Defendants.

No. Civil 112 Prescott

CHARLES LEE TROTTER,

Plaintiff,

vs.

FRANK L. CHRISTENSEN, et al.,

Defendants.

REPORTER'S TRANSCRIPT

The above entitled and numbered causes came on duly and regularly to be heard before the Honorable Dave W. Ling, Judge, presiding with a jury, at Phoenix, Arizona, commencing at the hour of 10:00 o'clock, a.m., on the 30th day of December, 1947.

The plaintiffs were represented by J. H. Morgan and Don Morgan, of Phoenix, Arizona, and B. W. Brobst, of Oakland, California.

The defendant was represented by Fred C. Struckmeyer, Sr., and James A. Struckmeyer.

The following proceedings were had: [1*]

The Clerk: Civil 111, Prescott, John S. Ray-

*Page numbering appearing at foot of page of original certified Transcript of Record.

burn, Plaintiff, versus Lightning Delivery Company, et al, and 112, Prescott, Charles Lee Trotter, Plaintiff, versus Lightning Delivery Company, et al, for trial.

The Court: Are you ready?

Mr. James Struckmeyer: The plaintiffs are ready, your Honor.

Mr. Morgan: The defendants are ready.

The Court: Has there been an order consolidating each case for trial?

The Clerk: Yes, your Honor. The third case has been settled, it has been vacated. That is the Santa Fe.

The Court: I understood that that was to be settled. You don't need to call that.

Mr. Morgan: At this time, if the Court please, I wish to move special counsel in this case, Mr. B. W. Brobst, of Oakland, California.

The Court: All right.

The Clerk: Shall I call 18 names, your Honor?

The Court: No, I think each side would be entitled to three challenges in each case. You had better call 24.

(Thereupon 23 jurors were called.)

The Clerk: That is 23 jurors, your Honor. [2]

The Court: You don't have 24 here this morning?

The Clerk: No, we notified 24 to be here, but one of them was excused.

The Court: Well, are you gentlemen willing to waive your challenges, either of you?

Mr. Morgan: Well, of course, we represent two

plaintiffs, the defendants represent one defendant. We think they should be willing to waive and take five.

The Court: Do you want to waive your challenges?

Mr. James Struckmeyer: Well, we will waive a challenge.

The Court: All right. There are two cases, ladies and gentlemen of the jury, upon which you will be asked to qualify this morning. One is Charles Lee Trotter against the Lightning Delivery Company, a copartnership, and Frank L. Christensen, doing business as the Lightning Delivery Company; P. J. Francis, doing business as the Lightning Delivery Company, and the other is John R. Rayburn against the same defendants. These complaints allege that Trotter was a fireman on the Santa Fe Railroad, and Rayburn was the engineer; that, at the Town of Kingman, in March of 1944, a truck [3] of the defendant was parked beside the railroad track, and in some manner, as I understand from the pleadings, was unattended at the time and it got loose and ran into the engine and derailed it and injured these plaintiffs, and these two actions are to recover damages for injuries which they claim they received at that particular time.

(Thereupon the jurors were examined on their voir dire by Court and counsel, after which 12 jurors were selected to act as jurors throughout the trial, after being first duly sworn.)

The Court: You may read your pleadings.

Mr. Morgan: Your Honor please, we are willing to waive the reading of the pleadings, if it is satisfactory.

The Court: All right. Do you want to make an opening statement?

Mr. F. C. Struckmeyer: I think the pleadings should be read so the jury will understand it.

Mr. Morgan: Very well. Gentlemen of the jury, these actions are both supported by means of complaints which I shall read to you.

(Thereupon the pleadings and the answers in both cases were read to the jury.)

Mr. Don Morgan: Now, if your Honor please, I would like to make a short statement of the case [4] to clarify the minds of the Court and jury, because the pleadings don't do that.

These cases grew out of an accident, gentlemen, on the morning of March 24th, about 1:20 o'clock, a.m., at Kingman, Arizona. The defendant was engaged as a contract or common carrier operating trucks for the carriage of livestock and other commodities in Arizona. He was the sole owner of the Lightning Delivery Company. On the morning of March 24th, or in that connection, gentlemen, the defendant, Frank L. Christensen, since the time of filing these complaints, we ascertained that Mr. Francis was not a member or owner of the Company at the time of this accident. Mr. Frank L. Christensen is the only defendant as sole owner of the Lightning Delivery Company at the time the accident occurred.

On the morning of March 24th, 1944, some time

before 1:20 a.m., his driver, C. E. Wilson, who was operating a 1940 Ford truck and semi-trailer on Company business, parked it near what was then known as Peggy's Cafe, on the north side of Highway 66, which parallels the Santa Fe westbound track. The truck was parked on a downgrade. This grade sloped west and south toward the Santa Fe tracks. [5]

At about 1:20 the second section of Santa Fe's No. 3 westbound passenger train, with two engines, was pulling into Kingman at a point a short distance of the Kingman Station, collided with defendant's truck, which had rolled down the slope, crossed the highway, and had come to rest across the tracks on which the second section of Train No. 3 was moving westward. The truck was driverless, was headed south across the track. The train's brakes were applied, but the train could not be stopped before the impact. The collision resulted in the derailment of the second engine, of which Rayburn was the engineer and Trotter the fireman. Both men were seriously injured. They have brought separate suits against the defendant upon the ground that the truck was parked in such a manner as to permit it to run away on the roadway where it was parked, and upon the said Santa Fe tracks, with the resulting collision and derailment of the second locomotive upon which plaintiffs were riding, and employed.

Since the basic facts apply to both cases, they have been consolidated for trial. All of the evidence which we expect to introduce will apply to

both cases, except the testimony as to the character and the extent of the injuries [6] suffered by each of the plaintiffs.

We will show, in presenting this cause, we will prove the facts which have been related, and will show to you that the negligent parking of the truck and semi-trailer on the grade mentioned was the direct and proximate cause of the collision, derailment of the engine, and the injuries suffered by the plaintiffs.

Now, with respect to Plaintiff Rayburn, we will show that at the time of the accident he was aged 47 years, and was in good health. We will prove that he was thrown from the cab of the engine a distance of approximately 15 feet, was rendered unconscious for a few moments, that he fell face downward on head and hands, that both his wrists were fractured. He received bone and muscle bruises on the right hip and on other portions of the right side of his body. He sustained multiple bruises and contusions above and below the right eye.

We will prove his hospitalization at Kingman and at the Santa Fe Hospital in Los Angeles, and show the treatment that was given to him over a long period of time, both in connection with the broken wrists and the injuries to his face. The testimony will show that he suffered and is [7] still suffering great pain and anguish because of these injuries, and that he was unable to return to work until February 1st, 1945.

He was earning at the time of his accident the

sum of \$600 per month, and for loss of time alone was damaged to the extent of over \$5000.

Our testimony will show that Mr. Trotter was a fireman on the second engine of No. 3, that he had been employed by the Santa Fe Railway for three years prior to the accident, and at that time he was 40 years of age. By the collision or derailment, he was knocked or thrown down between the tank and cab of the engine, where he was pinned for some time. His back was badly hurt and his right leg and left side were injured. He received hospital treatment and medical treatment over a considerable period of time, also was hospitalized twice at the Santa Fe Hospital in Los Angeles, and by reason of his injuries, was unable to return to work until February 9th, 1945. He was making \$450 per month at the time of the accident, and his damages for loss of time alone amount to around \$5000. His injuries were generally diagnosed as a low severe back strain or sprain, the indications being that the severe sprain of the lumbosacral region developed [8] irritation of the nerves, including the sciatic nerve on the right side, also he sustained contusions in the region of the left ribs, right thigh and right hip, and muscle strain of the low back and abdomen. For a long period he suffered intense pain because of these injuries, and is still suffering from pain and disability, particularly in the right leg.

When we have made this proof and this case is submitted to you, we expect a verdict for substantial damages on behalf of both of the plaintiffs.

Mr. Struckmeyer: May we reserve our opening statement?

The Court: Yes. Call your first witness.

Mr. J. H. Morgan: Mr. D. A. Pennington.

DEWEY A. PENNINGTON

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Morgan:

Q. For the record, will you give your name?

A. Dewey A. Pennington.

Q. Where do you reside, Mr. Pennington? [9]

A. Needles, California.

Q. Are you connected in any way with the Santa Fe Railroad Company? A. Yes, sir.

Q. In what capacity? A. Conductor.

Q. Conductor at the present time. How long have you been in the employ of the Santa Fe?

A. Seven years.

Q. In March of 1944, were you working for the Santa Fe? A. Yes.

Q. Directing your attention particularly to the 24th day of March, 1944, in Kingman, Arizona, were you at that time employed by the Santa Fe?

A. I was flagging on a passenger at that time.

Q. What passenger train were you on?

A. No. 3.

Q. Sir? A. No. 3.

Q. I can't hear you.

A. No. 3. I have asthma, I don't talk very loud.

Q. Were you on No. 3 or No. 1? A. No. 1.

(Testimony of Dewey A. Pennington.)

Q. Well, do you recall the morning, the early morning of March 24th, 1944?

A. How is that again?

Q. Do you recall the early morning of March 24th, 1944? A. Yes, sir.

Q. Particularly the time when one of the Santa Fe trains was derailed at Kingman?

A. We stopped at Kingman as the head of that train was derailed.

Q. You will have to speak a little louder, or maybe you have some trouble, I think, with your voice. A. I have asthma.

Q. You were on No. 1, you say?

A. Yes, sir.

Q. What time did No. 1 pull into Kingman?

A. About 1:00 o'clock.

Q. In what direction was No. 1 going?

A. West.

Q. You were being followed by what train?

A. No. 3.

Q. Do you recall whether it was the first or second section of No. 3? A. I don't remember.

Q. One of the sections of No. 3?

A. Yes. [11]

Q. No. 1 is a passenger train? A. Yes, sir.

Q. No. 3 a passenger train? A. Yes, sir.

Q. How long did you stay in Kingman?

A. About ten minutes.

Q. What was your duty at that time?

A. Flagging.

Q. Flagging the rear or front?

(Testimony of Dewey A. Pennington.)

A. The rear. We don't flag in front.

Q. I see, I didn't know. What did you do then when your train pulled into Kingman?

A. I went back about, probably a quarter of a mile or less.

Q. As I understand it, then, when No. 1 pulled into the station you went back to flag?

A. Yes, sir.

Q. In flagging, what are you supposed to do?

A. Go back there and stand, see if another train comes, and if it didn't, you go back in when they call you and stop it when it comes.

Q. Have you been running to Kingman for some time? A. Yes.

Q. You are acquainted with the country there?

A. Yes, sir. [12]

Q. Do you know a place known as Peggy's Cafe?

A. Yes, sir.

Q. Now, from where you were standing on the railroad tracks at which you were doing this flagging, did you have a view of Peggy's Cafe?

A. Very near opposite that cafe.

Q. Approximately how far away?

A. Well, about 75 or a hundred yards.

Q. Across the highway?

A. Across the highway on a little strip of ground between the highway and the railroad.

Q. I believe at that time the railroad, that is, the westbound track, runs generally westerly through Kingman? A. Yes, sir.

(Testimony of Dewey A. Pennington.)

Q. And Highway 66 parallels that road, doesn't it?

A. Yes, sir.

Q. How long did you remain at this place where you were flagging?

A. We stayed there about ten minutes.

Q. While you were there did you observe any truck in the vicinity of Peggy's Cafe?

A. Yes, I saw a truck sitting there at the west corner of the building.

Q. What kind of a truck was it; that is, could you tell?

A. I don't know what make it was; but it was about a ton and a half truck.

Q. Did it have anything connected with it in the way—a semi-trailer, or could you see that?

A. No, I didn't see any trailer.

Q. Well, all right. Go ahead now and tell what you saw there.

A. The only place open was at Peggy's Place and naturally I looked up that way. There was no one stirring over there as I saw this truck sitting there, and after it was back there a few minutes, a car drove up and a soldier and his wife got out and went inside.

Q. Which way was he going?

A. The truck was headed west.

Mr. Struckmeyer: May I have the previous answer read?

(The answer was read by the reporter.)

Mr. Morgan: I believe you made the statement

(Testimony of Dewey A. Pennington.)

concerning this matter a long time ago, didn't you?

A. Yes, sir.

Q. I think you reported this as a stock truck. What did you mean by a stock truck?

A. It had a stake body. It looked like it [14] was made and fixed up for hauling stock.

Q. Did that truck remain there all the time you were there? A. Yes, sir.

Q. Then I presume you got on your train and went west? A. Yes, sir.

Q. Now, the rear end of this truck with relation to Peggy's Cafe was approximately where?

A. Well, about—the truck—the cab of the truck out to the hood was out there behind the place.

Q. Sir?

A. Was sticking out behind the place. The body of the truck was sitting in front of the place.

Mr. Morgan: I think that is all. You may take the witness.

Cross-Examination

By Mr. F. C. Struckmeyer, Sr.:

Q. You did not go into the buffet?

A. No, sir; I never left the railroad.

Q. You did not see the accident on the railroad?

A. No. [15]

Q. You left there before? A. Yes, sir.

Q. And you did not see the truck leave this place where it was parked? A. No, sir.

Q. There were two trucks parked there, did you say? A. No, just one.

(Testimony of Dewey A. Pennington.)

Q. Which one?

A. I don't know what truck it was. I just saw one setting there.

Q. You saw it sitting there, and then another truck came up afterwards?

A. No, a car came up.

Q. A car came up? A. Yes.

Q. And where did it park?

A. On the opposite corner of the front of the building.

Q. Right close to the truck?

A. No, it had the building between them. The truck was at the west corner and the car was parked on the east corner.

Q. And the soldier got out?

A. The soldier and his wife got out and went inside. [16]

Q. Inside where? A. In the restaurant.

Q. Into the restaurant? A. Yes, sir.

Q. Well, you mean a soldier and a lady with him? A. Yes, sir.

Q. You didn't see their marriage certificate?

A. No.

Q. Many other soldiers around there at that time? A. I didn't see anyone else.

Q. How?

A. I didn't see anyone else.

Q. You didn't see anyone else. That was in March, 1944? A. Yes, sir.

Q. Did you stay out and flag for the other west-bound train? A. How is that?

(Testimony of Dewey A. Pennington.)

Q. Did you put out a flag or anything for the other westbound train?

A. No, it wasn't necessary.

Q. It wasn't necessary? A. No, sir.

Q. You pulled out? In other words, Train No. 1 [17] pulled out before Train No. 3 came in?

A. That is right.

Q. You have been interrogated about this many times, haven't you, by railroad officials?

A. No, I never have.

Q. Never have? A. No.

Q. You are aware that actions were brought by Mr. Rayburn and Mr. Trotter in California, are you not, and that they charge you with negligence——

Mr. J. H. Morgan: We object to that as improper cross-examination and move that it be stricken and the jury instructed to disregard it.

The Court: The objection is sustained. All right, disregard it.

Mr. Struckmeyer: You are in the employ of the Railroad now? A. Yes, sir.

Q. As conductor? A. Conductor.

Q. On passenger service? A. Yes.

Mr. Struckmeyer: That is all.

Mr. Morgan: That is all.

(The witness was excused.)

Mr. Morgan: Mr. Frank Christensen. [18]

The Court: Before you call him, we will have our morning recess. During the recess you are not to discuss the case among yourselves or permit any-

one to discuss it with you. Avoid forming or expressing an opinion on this subject. We will stand at recess for about five minutes.

(Thereupon a short recess was taken, after which all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

The Court: You may call your next witness.

FRANK L. CHRISTENSEN

was called as a witness by the plaintiffs for cross-examination, and being first duly sworn, testified as follows:

Cross-Examination

By Mr. Morgan:

Q. What is your name, please?

A. Frank L. Christensen.

Q. Where do you live, Mr. Christensen?

A. Flagstaff, Arizona.

Q. On March 24th, 1944, were you the sole owner of what is known as the Lightning Delivery Company?

Mr. Struckmeyer: That is negative, if your [19] Honor please.

The Court: That is what?

Mr. Struckmeyer: That is a negative answer.

Mr. Morgan: I wanted to——

The Court: Oh, well, he may answer.

Mr. Struckmeyer: All right.

The witness: A portion of it——

Mr. Morgan: Sir?

(Testimony of Frank L. Christensen.)

A. A portion of the original Lightning Delivery Company. In January 1st, 1943, I sold the baggage and transfer and one line and retained the stock hauling portion of the Lightning Delivery Company, doing business as Frank L. Christensen.

Q. That you retained? A. Yes, sir.

Q. By stock hauling, you mean you have trucks for hauling stock? A. Yes, sir.

A. Well, with respect to this truck which was involved in this accident at Kingman on March 24th, were you the sole owner of that truck?

A. Yes, sir.

Q. Who was driving the truck?

A. Conda E. Wilson.

Q. He was your employee?

A. Yes, sir. [20]

Q. At the time he drove the truck to Kingman and parked it there somewhere, he was your employee? A. Yes, sir.

Q. He was on your business. A. Yes, sir.

Q. What is the number of that truck?

A. Well, it was my number 15 in the old original fleet. I imagine you will call it No. 2. That is all I had left.

Q. I mean do you recall the license number?

A. My license number, no, sir.

Q. What make was the truck?

A. It was a Ford.

Q. What year? A. '41.

Q. Did it have a trailer; was it known as a stock truck? A. It was known as a semi-trailer.

(Testimony of Frank L. Christensen.)

Q. A semi-trailer which had stakes, I assume, for hauling stock? A. Yes, sir.

Q. Mr. Francis had no interest at all in this business at that time? A. No, sir.

Q. You were the sole owner of this part of the business? [21] A. Yes, sir.

Q. I believe you also hold a certificate with the Corporation Commission of Arizona?

A. Yes, sir.

Q. You were transacting business at that time as a common carrier? A. Yes, sir.

Q. Well, it was your truck that was involved in this accident, the one that ran on the tracks, for some reason, and derailed an engine or two?

A. It was my truck, yes, sir.

Mr. Morgan: That is all, Mr. Christensen.

Mr. Struckmeyer: That is all.

(The witness was excused.)

Mr. Morgan: Now, all other defendants may be dismissed in the case except Mr. Christensen, since Mr. Francis is not involved.

The Court: Very well.

Mr. Morgan: Call Mr. T. W. Atkins.

THOMAS W. ATKINS

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows: [22]

Direct Examination

By Mr. Morgan:

Q. What is your name, please?

A. Thomas W. Atkins.

(Testimony of Thomas W. Atkins.)

Q. Where do you reside, Mr. Atkins?

A. Needles, California.

Q. Are you employed by the Santa Fe Railroad Company? A. I am.

Q. How long have you been in the employ of that organization?

A. I have been in Needles approximately 12 years, and previous to that, for a number of years.

Q. Were you employed by that Company on the morning of March 24th, 1944? A. I was.

Q. Were you at that time connected or serving on the second section of No. 3, a passenger train westbound?

A. I was helper conductor in No. Section 3.

Q. You were what?

A. I was helper conductor.

Q. Do you recall that on the morning of that day, March 24th, there was a wreck, a collision at Kingman? A. Yes, sir. [23]

Q. Will you tell the jury just where you were when that occurred, which way you were going, in your own words.

A. Which way the train was going?

Q. Yes.

A. I was helper conductor on Second 3 this morning in question and I was in about the second coach at the time the train went into emergency, which indicated to me that something very unusual had happened. As soon as the train came to a stop, I went to the rear of the train to see if any of the passengers had been injured in any way, and find-

(Testimony of Thomas W. Atkins.)

ing none of them injured I came back to the head end of the train, got out of the head car and walked up to the right side of the train and seen that the engine—two engines and the baggage car had been derailed. I went around and looked at the truck which had been pushed in front of the lead engine to where they came to rest, and nobody was in the truck, and I went on around and up the other side of the train back to where the derailed—approximately where the truck had been sitting, and looked for the tracks on the other side of the rails, for the truck tire tracks, that is what I was looking for, and those I found a few feet west of this facing [24] point switch.

Q. A few feet west or east?

A. East of the facing point switch, and I went back around the same way and I came—and on the other side and for a short distance north and east I traced tire tracks of this truck, seen that they had come from that general direction, and then I went back over to the wreck and stayed there until the ambulance came and went with Mr. Rayburn to the hospital.

Q. When you got off the train and went up to the front end, with respect to the Kingman Station, where were the engines?

A. Well, they were, oh, I should say 150, 200 yards east of the Kingman Depot. That is just a rough guess.

Q. With respect to the tool sheds which at that

(Testimony of Thomas W. Atkins.)

time existed on the north side of the Railroad, where were those engines?

A. Well, the best I remember, they were west of the tool houses.

Q. How many engines were there on that train?

A. Two.

Q. You were going west? A. Yes, sir.

Q. What time of the morning was it that this [25] accident occurred?

A. Well, it was some time after one o'clock, I presume, but I wouldn't know for sure. I have no record of that. It was in the morning.

Q. Now, at the time you went up to the head engine, where was this truck?

A. Well, it was right in front of it, just where it pushed it down the track.

Q. It was held across what we commonly call the cow-catcher? A. Yes, sir.

Q. What is the proper term used for the front of the engine? A. Pilot.

Q. It was across the pilot. Now, did it have anything attached to the truck, anything attached to it?

A. Well, the best I remember, there was a trailer tied onto it, because the cab was on the left side of the engine, so there must have been something on the other side that I didn't pay any particular attention to.

Q. Now, these tracks ran, getting back to these tracks again, you found some tire tracks. Just where did you find these tracks?

(Testimony of Thomas W. Atkins.)

A. Well, they were about a foot over the [26] outside rail, two tires, two front wheels just dropped down like that. Of course, the rest of it had been obliterated near the track, between the track, but that much was left. They were clear and distinct.

Q. The railroad at that point runs west, does it not? A. Yes.

Q. How was the truck pointed; was the front end of the truck pointed towards the south?

A. Pointed south, yes, sir.

Q. These tire tracks you found were just over the south rail? A. That is right.

Q. Then from that point you followed those tracks in what direction?

A. Well, from that point I went back around the head of the train the same way that I came and then I followed them in a northeasterly direction.

Q. Did you see any buildings or cafes or anything like that?

A. Well, yes, there were buildings over there, but I didn't go that far.

Q. Do you know a place known as Peggy's Cafe, which was lighted up? [27]

A. Yes, I am acquainted with that place.

Q. Did you see that place?

A. I saw the place but I didn't go anywhere near that far.

Q. With respect to the vicinity of Peggy's Cafe, how did these tracks run from the railroad?

A. Well, they ran in a general direction of

(Testimony of Thomas W. Atkins.)

Peggy's Cafe from the point where I found them on the track there.

Q. Are you familiar with the contour of the ground there? By that, I mean how it slopes.

A. Fairly well, yes. It has a slope in a south-westerly direction there.

Q. Well, from the vicinity of this cafe, you mean across the road? A. Yes, to the track.

Q. Did you see one of the plaintiffs in this action?

A. John Rayburn, I saw him. He was laying on the ground in the vicinity of this little tool house.

Q. What condition was he in?

A. Well, he was in bad condition. I didn't see him when I first went around there. It was when I came back that I found him.

Q. He was on what side of the track? [28]

A. He was on the right side of the track. That would be on the north side.

Q. Do you know what engine he was on?

A. He was on the second engine.

Q. Was the second engine derailed also?

A. Yes, sir.

Q. What, if anything, did you do for Mr. Rayburn?

A. Well, I talked to him a little bit, that is all I could do while I was waiting for the ambulance. You couldn't move him, or anything.

Q. Were you there when the ambulance took him away? A. Yes, I went with him.

Q. You did? A. Yes.

(Testimony of Thomas W. Atkins.)

Q. Where did you go?

A. To the hospital, the City Hospital there at Kingman.

Q. Did you learn what his injuries were?

A. Well, approximately, yes. I couldn't say until they finished X-raying him, but I stayed as long as I could, and his arms were fractured and they thought at that time he had a leg fracture.

Mr. Struckmeyer: If your Honor please, there is [29] medical testimony——

The Court: Yes.

Mr. Morgan: I don't think it is material. I believe that is all.

Cross-Examination

By Mr. Struckmeyer:

Q. You followed the tracks of the truck back where it was supposed to have been parked, did you?

A. In that general direction, only a short distance from the track.

Q. How far?

A. Oh, I expect 20 or 30 feet.

Q. A very heavy grade, is it, from down——

A. Well, I wouldn't know how many feet per hundred feet fall it is, but I should imagine it should be around ten feet to the hundred feet, something like that.

Q. All right, and the truck itself was on the pilot?

A. Yes, sir.

Q. Had been pushed about how far?

A. Well, let's see. That would be the length

(Testimony of Thomas W. Atkins.)

of two engines and a baggage car and about half of a coach, I should imagine would be the distance. [30] A coach is about 60 feet long.

Q. It had been pushed a distance of two engines, you said? A. Yes, sir.

Q. And a baggage car? A. Yes, sir.

Q. And half a coach?

A. Approximately that is what I imagine.

Q. How far do you figure it had been pushed?

A. Well, I wouldn't say in feet, because I don't know how long an engine is in feet.

Q. Well, several hundred feet?

A. A couple, I should imagine.

Q. And it was still on the pilot when you saw it?

A. Well, it was across the front of the engine on the pilot. It wasn't entirely on the engine? It was on the ground.

Q. You don't know how it came there, the truck?

A. No.

Q. It looked as though the front wheels had stopped on the track, is that right?

A. The front wheels had not crossed both rails.

Q. Both rails? A. Yes.

Q. And then come to a stop? [31]

A. Yes, sir.

Q. The track itself is lifted? A. No.

Q. Well, the track is not flush with the ground?

A. It is in the yard; it is all smooth there. They do quite a bit of switching down there.

Q. You were not able to state how it got there?

A. I wouldn't know how it got there.

(Testimony of Thomas W. Atkins.)

Q. The Train No. 1 which had stopped there was carrying troops, was it not?

A. I don't know about No. 1. I have no idea what they had on No. 1.

Q. No. 3 was carrying what? You were on No. 3.

A. I was on Second 3, Second Section 3. It was a coach train.

Q. And it was carrying troops?

A. Passengers.

Q. Passengers, mixed passengers?

A. Oh, there was lots of them soldiers, but they were all furloughed soldiers on leave.

Q. Yes. Yes. Did you examine the truck itself?

A. Only to see if there was a driver in it.

Q. Did you look at the brakes, whether they were locked or not? A. No, sir. [32]

Q. Did you see whether or not the keys were in the truck? A. No, sir.

Q. You don't know anything about the condition of the truck itself, then?

A. Well, it was pretty badly mangled up.

Q. Yes, but outside of that you don't know anything about it? A. No, sir.

Mr. Struckmeyer: That is all.

Mr. Morgan: That is all. Thank you.

(The witness was excused.)

Mr. Morgan: Mr. Marbell.

SAM MARBELL

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Morgan:

Q. Will you state your name for the record?

A. Sam Marbell.

Q. Where do you reside, Mr. Marbell?

A. Kingman, Arizona.

Mr. Morgan: Will you mark these photographs as one exhibit, Exhibit 1 for identification, [33] 2, 3, this one 4, this one 5, this one 6, this one 7, and this one 8.

(The documents were so marked.)

Q. (By Mr. Morgan): In 1944, did you hold some official position with the State of Arizona?

A. I did.

Q. What was that position?

A. Highway Patrolman.

Q. What, sir? A. Highway Patrolman.

Q. Where were you located?

A. Kingman, Arizona.

Q. How long have you lived in Kingman?

A. 13 years.

Q. How long were you Highway Patrolman?

A. Not quite three years.

Q. At that time was there any Highway Patrolman stationed there also?

A. Temporarily, yes, sir.

Q. Who was that? A. Mr. John Willis.

Q. Now, on the early morning of March 24th,

(Testimony of Sam Marbell.)

1944, were you called by anybody to investigate an accident that occurred? A. I was.

Q. About what time of the morning? [34]

A. I'd say it was about 1:30 or 1:35.

Q. Where did you go?

A. To the scene of the accident. It was on the Santa Fe Railroad tracks in Kingman.

Q. You made an investigation at that time?

A. I did.

Q. What did you find there?

A. I found a Ford truck, a semi-stake body, stock trailer laying across the tracks directly in front of the train, a double engine train.

Q. And at what point on the Santa Fe Railroad?

A. With relation to the Santa Fe Depot there, possibly about a thousand yards.

Q. East? A. East of the depot.

Q. With respect to what is known as the cross-over switch or track, where were those engines?

A. They were stradling the cross-over; I do believe, at that time. I mean by that, both engines and all of the cars involved, they were right at that point.

Q. What truck did you find there in this situation? A. I found—what truck?

Q. Yes.

A. I found a Ford truck with a stock trailer [35] attached. My investigation disclosed that it belonged to Mr. Frank L. Christensen and was being driven by someone else at that time for transporting livestock.

(Testimony of Sam Marbell.)

Q. Were you able to ascertain where the first collision occurred between the truck and the engine?

A. Not definitely, only to draw an imaginary line from the last visible point where the tracks of the truck were visible, to where they were obliterated, which would indicate that they crossed the tracks at that point.

Q. By that you mean you found some tracks that indicated the truck had crossed the track?

A. That is right.

Q. Where did you find those tracks?

A. They were on the north side of the track in about—in a—oh, southwesterly direction heading towards the tracks.

Q. That would be east of where you found the pilot engine with the truck hanging on the pilot?

A. Yes.

Q. About how far east?

A. Oh, approximately 40 to 50 feet.

Q. In other words, the truck had been struck at a certain point and dragged westward? [36]

A. That is right.

Q. In dragging it westward did it knock down any switch station?

A. I didn't particularly notice any switch stations damaged.

Q. There were two engines on this train?

A. There was.

Q. Now, the pilot engine, will you tell the jury how that pilot engine was, was it derailed?

A. It was derailed, yes, it was.

(Testimony of Sam Marbell.)

Q. Leaning in what direction?

A. It was leaning to the south or on its left side heading west and off of the south side of the tracks.

Q. The second engine?

A. The second engine was just the opposite. It was headed more northerly and off the tracks as though they were beginning to jackknife. In other words, it appeared as though they started in separate directions and stopped right there.

Q. At the time you reached the scene of this accident did you see any enginemen?

A. I did not.

Q. They had been taken away?

A. Yes, they had.

Q. Now, then, did you attempt to ascertain [37] from where the truck had come?

A. Yes, I did.

Q. And were you able to ascertain where it had come from?

A. Yes. At the time, the information that I gathered and the inspection that I made led me to believe that the truck had been parked in the vicinity——

Mr. Struckmeyer: Just a minute.

Mr. Morgan: Go right ahead.

A. I was making an investigation in an official capacity, and I made it my business to try to find out the details. My investigation disclosed that the truck was parked in the vicinity of what is known—what was known then as Peggy's Cafe, which would have been across the U. S. Highway 66, approxi-

(Testimony of Sam Marbell.)

mately 150 yards northeast of the scene of the accident.

Q. Did you ascertain in what way it was parked? By that I mean was it pointed westward on the road or eastward?

A. It was parked in a jackknife position, the cab headed—the front of the truck head west.

Q. On the north side of the road?

A. On the north side of the road.

Q. Would that be partly on the right of way?

A. Yes, it would, off the pavement.

Q. Now, from that point where you ascertained the car had been parked, can you tell the jury what the grades are, the contour of the country?

A. Yes. In the vicinity of Peggy's Cafe from the spot where the truck was originally parked, that is on a knoll, it is high ground on the north side of the highway. The road there makes two little dips. The first one is considerably east of that point and then it raises again on a knoll where Peggy's Cafe sits, on a little high ground, and from there then it slopes again southwest, south—it slopes—the general contour of the road is downgrade west, and the contour of the terrain on the south side of it is southwest. In other words, it rolls off that knoll, so to speak.

Q. How much of a grade exists there between the railroad at the point where you found these tracks on the railroad and Peggy's Cafe?

A. The overall grade?

Q. Yes.

(Testimony of Sam Marbell.)

A. I never have tried to ascertain the definite amount of grade there, but I would say——

Mr. Struckmeyer: If your Honor please, I object to it, he has never ascertained it. That [39] is a matter of accurate measurements.

Mr. Morgan: Oh, no, no, it is an estimate.

The Court: All right. You may answer.

A. I'd say about a four per cent grade.

Mr. Morgan: I will put it this way: How much lower is the railroad track right in front of Peggy's Cafe, or alongside of Peggy's Cafe where this car was probably parked?

A. Approximately 14 feet, 14 or 15 feet.

Q. And the distance you say is 150 yards?

A. That is right.

Q. A car or truck of the kind and character involved in this accident, parked in the vicinity of Peggy's Cafe, if the brakes became loosened for some reason, it would be the natural thing to roll down in that direction and upon the tracks?

A. Yes, it would.

Q. Did you take some photographs?

A. I did.

Q. I hand you here Plaintiffs' Exhibits 1 to 8 for identification. Are those the photographs of the truck and the engines involved in this action?

A. Yes, they are.

Q. When were those taken?

A. The night of the accident, oh, somewhere between about two or two-fifteen. A part of them were between two and two-fifteen the morning of the 25th

(Testimony of Sam Marbell.)

—the 24th, and the balance of them were taken the next morning after daylight.

Q. Some of them were taken by flashlight?

A. That is right.

Q. And these generally depict the situation as you saw it and as you came there on the morning of the 24th?

A. Yes, sir.

Mr. Morgan: We offer these in evidence.

Mr. James Struckmeyer: May we see them?

(The documents were handed to the attorney.)

Mr. James Struckmeyer: If the Court please, we object to the introduction of the photographs taken the following morning, on the ground that after the two which show the truck, the truck at that time had been moved off the right of way by the Santa Fe Railroad Company and they do not actually represent and picture the condition at the time of the accident, and the same objection as to the other two taken in daylight, that they show by the pictures men working on the highway, and does not accurately represent the occasion. The other four we do not object to.

The Court: I will sustain the objection. [41]

(Thereupon Exhibits 2, 3, 7 and 8 were withdrawn.)

Mr. Morgan: Is that 2, 3, 7 and 8?

Mr. James Struckmeyer: The flash pictures we do not object to.

(Thereupon the photographs were marked as Plaintiffs' Exhibits 1, 4, 5 and 6 in evidence.)

(Testimony of Sam Marbell.)

Q. (By Mr. Morgan): Handing you now Nos. 1, 4, 5 and 6, which have been admitted in evidence, will you take them in order, take No. 1, and will you tell the jury—you might hold it up so the jury can see it, and tell them what it represents.

A. Gentlemen, this photograph was made by myself soon after the accident happened, and that represents the truck, or a portion of it, the cab and the front of the engine. You see that?

Mr. Morgan: Just hand it to the jury.

Mr. Struckmeyer: Will you refer to it by number?

The Witness: No. 1.

Q. (By Mr. Morgan): This is No. 1.

The Witness: This is No. 4, which was also taken by me at the same time of another portion of the engine. No. 5 picture of the engine 1306 taken at the same time, and No. 7 is a picture trying to show the attitude of the engine at the [42] time. I took it from the north side.

Q. You didn't see the injured plaintiffs?

A. Beg pardon?

Q. You didn't see either of the injured plaintiffs, I take it? A. No, I did not.

Mr. Morgan: I believe that is all, Mr. Marbell. You may cross-examine.

Cross-Examination

By Mr. F. C. Struckmeyer, Sr.:

Q. Who are these two posiers on one of these pictures, I mean those two men; that is Exhibit No. 4?

(Testimony of Sam Marbell.)

A. Those are the crew on that train, on that engine.

Q. Oh, I see. They were on the witness stand here before, they were in the courtroom?

A. I didn't recognize them.

Q. Where had this truck been parked—you followed it backwards up, where had it been parked?

A. Up in front of Peggy's Cafe, up on the west side of Peggy's Cafe.

Q. I mean the precise point of parking, had it been parked in front of Peggy's Cafe?

A. It was parked west of Peggy's Cafe. The [43] precise point I had no way of determining.

Q. You are not able to state where it had been parked, the precise point? A. Yes.

Q. The precise point?

A. Not the precise point, no, sir.

Q. It was parked in the parking area, was it not? A. No, sir.

Q. It was parked in front of the service station, was it not? A. No, sir.

Q. Where was it parked?

A. It was parked between the building that was used at that time as a garage, and Peggy's Cafe.

Q. What is that building used for next to Peggy's Cafe? A. A garage.

Q. Garage? A. That is right.

Q. Immediately adjoining Peggy's Cafe is the garage?

A. No, sir. There was an area between the two buildings.

(Testimony of Sam Marbell.)

Q. Can you draw a diagram? [44]

A. I believe I can.

Q. I wish you would draw a diagram where it was parked. First draw Peggy's Cafe and the highway, I suppose.

(Thereupon the witness draws diagram on the blackboard.)

Mr. Struckmeyer, Sr.: Now this one here you have marked "garage," mark that "A", will you please, so we may be sure about that.

(The witness complies.)

Q. And "B" is Peggy's Cafe.

(The witness complies.)

Q. All right. Now, the truck was parked where? Draw a diagram where the truck was parked.

(The witness complies.)

Q. And it was parked which way, facing which way? A. Facing west.

Q. Facing west? A. Headed west.

Q. It pointed toward the west and that is an open area, an alleyway?

A. Yes, sir. It is not an alleyway. It is an open area, but private property.

Q. Private property? A. Yes, sir. [45]

Q. What is immediately west of the garage?

A. Service station.

Q. Mark that, please.

A. (Complying) This is the building and this is the surrounding area.

Q. You are positive that the truck was parked

(Testimony of Sam Marbell.)

where you have indicated there, you are positive of that?

A. I didn't see the truck parked there, but my investigation told me that the truck was parked there.

Q. You investigated that the next did, didn't you, not with Mr. Christensen?

A. I investigated it the same night, it seems to me right after the accident happened.

Q. And you investigated it with Mr. Christensen afterwards, did you not? A. No, sir.

Q. Did you talk with Mr. Christensen?

A. I don't believe I did.

Q. Did you take a statement from him?

A. No, sir.

Q. Did you take a statement that night from Wilson, the driver? A. No, sir.

Q. Have you your notes on your investigation?

A. No, I don't.

Q. Where are they?

A. They are in the Highway Department.

Q. Are you still in the employ of the Highway Department? A. No, sir.

Q. Who has charge of them in the Highway Department now?

A. Who has charge of the Highway Department?

Q. Who has charge of your notes?

A. I assume that the Highway Patrol and the Safety Division has them.

Q. Who are you employed by now?

(Testimony of Sam Marbell.)

A. I am self employed now.

Q. Photographer?

A. No, sir; that is just a hobby.

Q. You are employed at Kingman?

A. Yes, sir.

Q. Running a business there?

A. Yes, sir.

Q. At Kingman? A. Yes, sir.

Q. What business?

A. Tourist court and service station.

Q. Tourist Court? A. Yes, sir. [47]

Q. Could it not have been possible that this truck was parked further over west from where you say it was parked?

A. No, it could not.

Q. It could not have been? What made you say—Can't you get your notes from the Highway Department? A. I don't think so.

Q. Did you check the truck at all?

A. I did.

Q. What was the condition of the brakes?

A. I didn't check it mechanically; I wouldn't know.

Q. Was the key in the lock?

A. I didn't notice whether the key was in the ignition switch or not.

Q. Was it in gear? A. Yes, it was.

Q. What gear? A. I don't know.

Q. How do you know it was in gear then?

A. Because I checked it.

Q. That night?

(Testimony of Sam Marbell.)

A. That has been three years ago, yes, sir.

Q. Been three years ago? A. Yes, sir. [48]

Q. If we were able to get your notes from the Highway Department it would refresh your recollection, would it not?

A. Yes, uhuh. There are no notes of mine with the Highway Department.

Q. You turned your notes in to the Highway Department?

A. I did not. My associate did.

Q. You took a statement from Mr. Wilson, did you not, the driver? A. I did not.

Q. You talked to him that night?

A. I did.

Q. You did not take a statement from him?

A. I did not.

Q. You did not ask him where he had parked his car? A. Yes, I did.

Q. What did he answer?

A. He pointed to the general direction of the cafe.

Q. You made notes of it, though?

A. Yes, I did.

Q. But you did not turn those notes in to the Highway Department? A. I did not. [49]

Q. Where are those notes now?

A. I don't know, probably have been destroyed.

Q. When did you leave the Highway Patrol Service? A. Oh, 1945.

Q. Wasn't it customary at that time that im-

(Testimony of Sam Marbell.)

mediately—you made a report to the Highway Department? A. I did not.

Q. You did not? A. No, sir.

Q. Wasn't it customary to make a report to the Highway Department on any accidents that you had investigated? A. Yes, it was.

Q. And wasn't it customary with the Highway Department that you turn in your notes which you had taken? A. That is right.

Q. But you did not do so?

A. That is right.

Q. Why not?

A. Because my associate did. There were two of us working on the case.

Q. Is he here? A. Yes, he is. [50]

Q. He is here? A. That is right.

Q. He took the notes? A. Yes, sir.

Q. He has the notes now?

A. I don't know.

Q. These pictures were a part of the Highway Department's photography, were they not, a part of your report? A. No, sir.

Q. Did you turn in any pictures to the Highway Department? A. I personally did not.

Q. Did your associate? A. I don't know.

Q. Did you give him copies of the pictures?

A. I don't remember whether I did or not.

Q. To whom did you deliver these pictures that were introduced in evidence?

A. Those pictures that were introduced in evidence were made and processed by myself and sent

(Testimony of Sam Marbell.)

to a man at Needles who was directly interested in this accident. As a matter of fact——

Q. Who? A. I think a Mr. Peeler.

Q. Peeler? [52]

A. I think that is right.

Q. He was the engineer, was he not, of the Santa Fe?

A. He was a part of the crew on a train. In what capacity, I don't know.

Q. On Train No. 3?

A. Yes, that is right.

Q. He was the engineer on the first engine, was he not? A. I think so, on No. 1306.

Q. Did you take a statement from him at the time? A. No, sir.

Q. Did your associate? A. I don't know.

Mr. Struckmeyer: That is all.

Redirect Examination

By Mr. Morgan:

Q. You were asked, Mr. Marbell, if this truck could have been parked down somewhere in this section and you said no, it could not have been. Will you explain why it could not have been parked there? A. I could explain that.

Q. Go right ahead. [53]

A. It had to do with the contour of the ground. The reason that it could not have been parked here——

Mr. Struckmeyer, Sr.: Well—go ahead.

A. To be parked here is because the highway from the center line slopes to the north and to the

(Testimony of Sam Marbell.)

south, and in order to—and at this point it slopes from the north to the south, and in order for the truck to have moved from this position or anywhere in the vicinity of this accident, which has a level driveway, perfectly level, practically as perfect as they could get it, would have to be under power to get over the hump in here and drop down here, a ways here. It is all downgrade with no obstruction. It could not possibly have moved from this point to here unless it was under power and being driven over it.

Mr. Morgan: Q. Now, referring again to the sketch that you made, Mr. Marbell, in which you place the truck itself apparently towards the highway. Would that be within the boundaries of the highway, the truck?

A. You mean the right of way?

Q. The right of way. A. Yes.

Q. Would you mind running a line along where the right of way exists there?

A. With relation to the approximate position of the truck?

Q. Yes, and the buildings. As I understand, these marks indicate the paved portion of the highway? A. That is right.

Q. Now, the north line of the right of way, where would that run with reference to those buildings?

A. About, oh, here, and then I would say, in

(Testimony of Sam Marbell.)

relation to the buildings, this building in particular is about six feet.

Q. Six feet south of the south boundary wall of the building, Peggy's Cafe?

A. That is right.

Mr. Morgan: I believe that is all.

Recross-Examination

Mr. Struckmeyer:

Q. The only reason you say the car was not parked over here in the garage area is because it could not have gotten away on its own power?

A. No, sir.

Q. Unless somebody interefered with it, somebody set it in motion? [55]

A. That is right.

Q. But over here where you placed it, it could have gotten away on its own motion?

A. That is right.

Q. Even though it was locked and the brakes set?

A. That is right.

Q. The brakes set?

A. With mechanical failure it could have done anything. I don't know whether the brakes were set or not.

Q. But there would have to be mechanical failure before it could of its own motion?

A. Either that or negligence on the part of the driver in not setting the controls.

Q. In not setting the controls, yes.

A. Yes.

Q. But if it had been parked in this garage

(Testimony of Sam Marbell.)

area it could not have gotten away at all unless somebody had caused it? A. That is right.

Q. That, where you have drawn the truck as being parked, that is a part of the common parking area, is it not? A. No, it is not.

Q. Trucks and cars used to park there? [56]

A. I can't say.

Q. They did, did they not?

A. I don't know.

Q. It was right where you parked it, it is still a part of the highway, is it not, this upper line that you drew here, that is as far as the highway itself exists?

A. The highway right of way. This line represents the right of way, and this line represents the paved portion of the highway.

Q. I see.

A. This is all private property. There is an alleyway or areaway there.

Q. But the highway itself is up under the upper line? A. Yes, sir.

Q. Mark that "Upper line" some place to indicate it. That is your highway, is it?

A. That is right.

Q. You have seen cars parked there, which is about in a position where you put this car?

A. I don't believe that I ever remember seeing a car parked there.

Q. May have been, though?

A. There may have been, it is possible.

(Testimony of Sam Marbell.)

Q. As a matter of fact, people going into [57] Peggy's Cafe, they park along there, do they not?

A. Along in front of the cafe usually.

Q. In front or to the west?

A. I don't ever remember seeing parked there.

Mr. Struckmeyer: That is all.

Redirect Examination

Mr. Morgan:

Q. Just a minute. Now, while you are there, Mr. Marbell, I wonder if you could just sketch in the railroad track going westbound, the west track.

A. The west track runs parallel to the highway at this point. I'd say with relation to the highway it is about like that (indicating on diagram).

Q. Now, where you saw these tracks crossing the railroad track, would you have room on that plat there to show where it would be extended westward?

A. I ran out of board here, but the tracks that were visible were about at this point and headed this way (indicating on diagram).

Q. Were there any obstructions between the point on the railroad tracks where you saw the tire marks and Peggy's Cafe that would prevent a [58] car that got loose, a truck from running down on the tracks?

A. Following the path it took, no, but on either side there are.

Q. There was an open way, was there not?

A. Yes, there was.

Mr. Morgan: That is all.

(Testimony of Sam Marbell.)

Mr. Struckmeyer: One more question. This sketch, of course, so far as distances are concerned, that you have drawn there is relative. Will you, without exact measurements, point out 75 to 100 yards west of Peggy's Cafe, mark that 75—I am not asking you for precise measurements, but approximate, 75 to 100 yards west of Peggy's Cafe?

(The witness complies.)

Q. Would you mark it below here—I don't mean on the way down, 75 yards west of Peggy's Cafe, if you will mark that, 75 to 100 yards.

(The witness complies.)

Mr. Struckmeyer: All right, that is all.

The Court: The Court will stand at recess until two o'clock. Keep in mind the Court's admonition and report back at two.

(Thereupon a recess was taken at 12:00 o'clock noon.) [59]

2:00 o'clock, p.m.

All parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: Call your next witness.

Mr. Morgan: Mr. Trotter, please.

CHARLES LEE TROTTER

was called as a witness in his own behalf, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name, please?

A. Charles Lee Trotter.

(Testimony of Charles Lee Trotter.)

Q. Are you the plaintiff in one of these cases?

A. I am.

Q. Where do you live, Mr. Trotter?

A. Needles, California.

Q. At the present time are you employed by the Santa Fe Railroad Company? A. I am.

Q. In the year 1944, were you employed by that Company? A. I was.

Q. In what capacity? [60]

A. Locomotive fireman.

Q. How long have you been a fireman?

A. Approximately three years.

Q. I presume you recall the date of March 24th, 1944, in reference to a collision that occurred at Kingman, Arizona? A. I do.

Q. Had you been running over that road for some time? A. Yes, I had.

Q. Prior to that date? A. Yes.

Q. Were you employed on one of the trains that morning?

A. I was fireman on the second engine.

Q. The second engine of what train?

A. Second section of No. 3.

Q. About what time was it due in Kingman?

A. Well, it was running late that morning.

Q. Well, do you know about what time it would have come in?

A. No, I can't. We have had so many changes in the time table than we had time table to furnish that information.

(Testimony of Charles Lee Trotter.)

Q. Do you know whether you were due for a stop at Kingman that day? [61]

A. Yes, we were.

Q. Well, about somewhere about 1:20, or thereabouts, on the morning of the 24th of March, 1944, you say you were firing the second engine?

A. Yes, sir.

Q. Who was on the first engine?

A. Mr. Peeler was enginer and Mr. Gibson was the fireman.

Q. Who was the engineer on your engine, the second engine? A. Mr. Rayburn.

Q. Mr. who?

A. Mr. Rayburn, John S. Rayburn.

Q. Will you tell the jury now in which direction you were going and how you did come to come into Kingman that morning?

A. We were going west and we had to stop, you know, at the station, and when we came around the curve and on the straight track, I looked out the window and saw an object, a truck on the track, and I hollered to the engineer that there was a truck on the track, and the next thing I saw was the fireman on the head engine, he was climbing back on the tank, and that looked like a good move to me, so I attempted to climb back on the tank of my engine. Well, as I got up on the top [62] step, the engine went on the ground and the cab struck me on the head with a terrible blow and knocked me back into the gangway and pinned me

(Testimony of Charles Lee Trotter.)

between the tank and the cab of the engine, and I don't know how long I was there, but the next thing I remember, I was going up alongside of the engine, and I kind of come to myself and I thought of the engineer, I wondered what happened to him or where he went, so I managed to climb between the engine and the first car to the right side of the engine, and there I found Mr. Rayburn laying on the ground up close to a shed, and I thought he was dead, and I took hold of him and shook him, and he hollered that he was in very much pain, that that arm was broken, not to shake it no more, so I knew I was quite badly hurt, but I knew he had to have help, I knew he was hurt bad, so I hobbled down to the station to get help, and on arriving there I met the operator and I told him what the trouble was. He immediately discovered that I was hurt, so he got someone else to take me to the hospital, and I don't know exactly who that was, but I heard afterwards that it was the night watchman, and there I was examined, and he taken my side up, it was badly bruised, and he thought [63] perhaps my ribs was broken, and all up and down my right side I was badly bruised, black and blue, and he gave me some pain pills, and it seems like he put me in a room there. I don't have any clear vision of that, and it seems like they moved Mr. Rayburn in there with me and later in the day they moved me to Needles, California, and there I was taken home, and my wife afterwards took me to

(Testimony of Charles Lee Trotter.)

the hospital where they made a thorough examination, so they recommended I go into Los Angeles, to the Santa Fe Hospital for further examination, and that is what took place.

I was held there approximately four days where they examined me and took X-rays, and they released me to go home then, they would not release me to go to work, but they did release me to go home, and I couldn't get no comfort, I was just in constant pain with my back, so the doctor there at Needles, after a few days' treatment there and physiotherapy light treatment, heat pads, why, he says, "You better go back to the hospital again for a further check-up," so I went back to Los Angeles to the Santa Fe Hospital. They put me to bed on boards with just a pad on them, they said that was the cure for an injured back, and they also put me in traction. If you [64] gentlemen don't happen to know what traction is, they took my leg full length and hung a weight over the foot of the bed over a pulley and left me there approximately 14 days, to my knowledge, and I didn't—I didn't get any better. There was no treatment they ever gave me there that ever done me any good. So, after they took me out of this traction they started to give me physiotherapy treatments, and of course that never did do me any good. I still had the bad leg and the pain in my lower back. Well, I got them to release me to go home again and so they recommended that I go ahead and take treatments

(Testimony of Charles Lee Trotter.)

at the local hospital at Needles, which I did. My wife would take me up there each day for these treatments, so I wasn't getting any better in fact, I was worse. My nerves is all upset, I couldn't set still, I couldn't stand up with comfort, or sit down, so I was sent back to the Santa Fe Hospital. That was about the last of June, and at that time I was assigned to Dr. Chafman, and he recommended that I take a leave of absence and get away from everything, he thought probably that would settle my nerves, so I went back to Nebraska, my previous home, and I was there until October, and I came back to Needles then and was there until [65] February, at which time I asked to go back to work. I wasn't getting any better; I had three dependents; I never received no money from any source, I had to have some income of some kind, so I asked to go back to work, so they released me to go to work about February 10th, and they assigned me to a passenger job, which is quite a bit easier than a regular freight job, so that is what helped me out, I could manage to get enough hours in between the runs to carry on my work.

Q. Do you still have trouble with your back?

A. I do, I am in constant pain.

Q. By the way, what wages were you making at the time of this injury?

A. Between 450 to 500 dollars a month.

Q. You were in what service at that time?

A. I was locomotive fireman, I was firing a reg-

(Testimony of Charles Lee Trotter.)

ular, what they call freight pool at the time of the accident.

Q. When you were put back to work you say you were limited to a certain sort of service?

A. Yes, to passenger. I took the passenger job, which was for the comfort of myself. The big passenger engines ride easy.

Q. How long did you continue in that work after [66] you went back to work?

A. I fired a passenger approximately two years after I went back to work.

Q. What were your wages after you went back to work in this special work as compared with the wages you earned at the time of the accident, before the accident?

A. Well, approximately 100 dollars less a month.

Q. Then it was a two year period that you worked? A. Yes.

Q. Did you lose any time during that period?

A. Yes, I did, I laid off a lot. I couldn't get enough rest in between runs to carry on my work like I should.

Q. For the two years, from February 10th, 1945, I believe is when you went back to work, approximately how many days a month did you lose?

A. Well, I'd say four days a month I was off.

Q. As I understand from your testimony, from March 24th, 1944, up until about February 10th, 1945, a period of approximately ten and one-half months, you were not employed?

(Testimony of Charles Lee Trotter.)

A. No, I wasn't. I had no source of income whatever. [67]

Q. You earned nothing?

A. I didn't earn a dime.

Q. If you had been employed during that period of time, you could have earned at least 450 a month?

A. Yes, I could have.

Q. The reason you were not employed was on account of your condition?

A. That is right.

Q. At the time of this injury and the accident that you have related, what was your health at that time?

A. It was good.

Q. Had you ever been affected with lameness or back trouble?

A. No, I never had. I was sound.

Q. What is your age?

A. Now or then?

Q. At that time.

A. At that time I was 40 years old.

Q. Were you a married man?

A. Yes, sir.

Q. Some children?

A. I have two children.

Q. And I believe you stated you lost about a hundred dollars a month for the two years that you went back to work after February 10th?

A. Yes, that is right.

Q. As well as ten and one-half months total loss of wages?

A. Yes, sir.

Q. Now, let's get back to this accident again for a few moments. You say you were on the second

(Testimony of Charles Lee Trotter.)

engine and you looked out? A. Yes.

Q. And you saw this truck?

A. Yes, I saw the truck.

Q. About where, with reference, well, we will say the Tarr-McComb siding at Kingman, the first switch track that ran out to the Tarr-McComb siding, about where do you think it was?

A. I thought it was?

Q. Yes.

A. Well, I knew it was this side of the switches, all right, I knew that.

Q. I see.

A. But that is all I knew, it was this side of the switches.

Q. Which way was the truck headed when you saw it? A. It was headed south.

Q. It was on the track, across the track at [69] that time? A. Yes, it was across the track.

Q. You say you said something to the engineer about to give her the air?

A. Yes, I hollered at him to "big hole it." That is a by-word for emergency application.

Q. At that time did the train slow up?

A. Yes, you could feel it stopping.

Q. And it was the pilot engineer that put on the brakes?

A. No doubt it was, he handles the air.

Q. In any event, the train struck—the first engine struck this truck? A. Yes.

(Testimony of Charles Lee Trotter.)

Q. Do you know whether that truck was carried some distance after it was struck?

A. Well, yes.

Q. Sir?

A. I understood that it was dragged quite a distance before we come to a stop.

Q. You don't just recall that?

A. No, I don't recall it.

Q. When you went around the engine there toward the station, as you relate, after seeing Mr. Rayburn on the ground, you must have passed the pilot engine as well as your own engine? [70]

A. Yes, I did.

Q. Did you notice the truck there hanging on the pilot at that time? A. Yes, I did.

Q. Do you know whether anything was appended to it in the way of a semi-trailer?

A. I knew it was a big truck, but I didn't know what kind.

Q. Now, during or immediately following this injury, at the time of this injury, did you suffer any pain? A. During——

Q. Yes. At the time this injury occurred and you were pinned down between the cab and the——

A. Yes, I did. I screamed out. I knew if the engineer was there he could have heard me. I was pinned in there with no chance of getting out.

Q. Did you afterwards see your sides, the bruises that were on your person?

A. When I was taken to the hospital and stripped down.

(Testimony of Charles Lee Trotter.)

Q. You might tell just how you were bruised and what you, yourself, saw.

A. It started here and bruised down——

Q. By “here,” you mean in the upper right chest? [71]

A. Yes, along the right side and completely along the right side clear down to the right leg to my knee. I saw skin black and blue.

Q. How long did that condition continue on your body?

A. Well, I had a spot on my hip there that lasted for almost a year that I know before it went away, but the other cleared up pretty quick.

Q. Do you still suffer pain from that leg?

A. Yes, I do.

Q. Just what is the trouble with it, how does it affect you?

A. Well, I have just got constant pain there. It is just something tore loose in there, I don't know what it is, but it is just constant hurting all the time.

Q. Where does the pain begin?

A. Well, it starts in the lower part of my back and goes down by right leg to the calf of my leg. It is just like that leg wasn't there, just a one-legged man, that is the way I feel like.

Q. At the place where you struck, where the pilot engine; that is, the first engine struck this truck at Kingman, is there any road across the track? [72]

A. No, there isn't.

(Testimony of Charles Lee Trotter.)

Q. Are you familiar with the location known as—which has been referred to in the testimony as Peggy's Cafe?

A. Well, I have eat there when I was on freight trains.

Q. With reference to Peggy's Cafe, where did this engine strike the truck on the front, if you know?

A. Well, I don't know. I don't know where it would be.

Q. You were traveling westward. Do you recall about what speed the train was making?

A. I'd say 30 miles an hour.

Q. But it was slowing up coming in?

A. Yes, it was slowing up.

Q. Now, do you have any control of the speed on the train? A. I do not.

Q. Because you are on the second engine?

A. That is right, and the fireman, his duties is to keep the engine hot and keep air in it for the engineer.

Q. Who controls the speed of a train of that character when there are two engines?

A. The man on the point, the engineer on the point.

Q. That is the first engine?

A. Yes, the first engine.

Mr. Morgan: You may take the witness.

Cross-Examination

Mr. Struckmeyer, Sr.:

(Testimony of Charles Lee Trotter.)

Q. You say the train was going 30 miles an hour? A. Up to my knowledge, it was.

Q. How? A. To my knowledge.

Q. That is your best knowledge? A. Yes.

Q. That is a very steep grade going into Kingman, is it not?

A. The time card says that it is.

Q. You went back to work on February 10th or 9th, is that right?

A. Well, somewhere around that period, I don't recall.

Q. Well, you remember your deposition was taken? A. Yes, sir.

Q. And you said at that time you went back to work February 9th, but that one day doesn't make any difference.

A. Well, I wasn't right certain. I had it down in my book at home, but I don't have it with me.

Q. Yes. And you were receiving your pay, \$450 to \$500? A. Yes.

Q. What is the exact amount, have you got that? A. No, I have not.

Q. And when you went back to work you did approximately the same duties as you did before, did you not, only in passenger service?

A. I performed the services of a fireman.

Q. Yes, and your pay was about the same as you had received before?

A. Well, I couldn't say that it was.

Q. Well, you said a minute ago in answer to

(Testimony of Charles Lee Trotter.)

Mr. Morgan's question that it was about a hundred dollars less?

A. That is right, I did say that.

Q. Now, in the taking of your deposition, this question was asked you, was it not—well, I will read some preliminary questions so you can get the sense of it.

“Question: Practically the same duties that you did before? Answer: Yes, only in passenger [75] service.” Then this question was asked you:

“Question: Oh, I see. Your pay is increased, then, more than you received on February 24th of last year?” And did you to that question answer: “Well, about the same.”

A. I don't get your question.

Q. The question was this: Referring to your pay, after you went back to work—— “Question: Your pay is increased then, more than you received on February 24th of last year? Answer: Well, about the same.” Did you make that answer to that question?

A. At the time of the deposition?

Q. Yes; that deposition was taken on the 3rd day of April, 1945.

A. I don't remember making the statement.

Q. Well, if that is in your deposition you made that answer and that is correct, you received about the same pay that you received before?

A. Well, I might have received the same pay

(Testimony of Charles Lee Trotter.)

for the kind of work I was doing, but I probably didn't perform as much work.

Q. You kept a memorandum of your exact pay, did you not?

A. Yes, I always kept a memorandum of that.

Q. You haven't got that with you? [76]

A. No, I do not have.

Q. You expected to be asked questions concerning your pay, did you not?

A. I guess that is right.

Q. You were taken to the hospital at Needles at first—no, at Kingman, I mean? A. Yes.

Q. And you stayed there how long?

A. Well, I don't remember just how long they had—

Q. Just a few hours, was it not?

A. No, I was there, it seems to me like, until noon.

Q. How long?

A. Approximately noon before I could—

Q. And that is from after 1:30 when you were taken there up until noon? A. Yes.

Q. And then you were taken where?

A. To Needles.

Q. How long did you stay there?

A. Well, I stayed there over night—not over night, but I caught one of the trains to Los Angeles.

Q. To the Santa Fe Hospital in Los Angeles?

A. Yes, sir.

Q. How long did you stay there? [77]

A. Approximately four days, to my knowledge.

(Testimony of Charles Lee Trotter.)

Q. And that was the regular Santa Fe Hospital?
A. Yes, sir.

Q. And that is where you were treated?

A. Yes, sir.

Q. And then you went back to Needles?

A. That is right.

Q. And went home?
A. That is right.

Q. And stayed home?

A. Well, I was taken every day to the hospital for treatment.

Q. You stayed home, however, you lived at home?
A. Yes, I stayed home.

Q. Where did you live there in Needles?

A. Mariscar Auto Court.

Q. Who paid your rent?

A. I paid it myself.

Q. But when did you go back to Los Angeles to the hospital?

A. Well, I don't remember how long it was before I went back.

Q. Where?

A. I say I don't remember how long it was. I have no account of that whatever. [78]

Q. Well, you were also examined by your own personal physician, Dr. Lopizich?

A. Yes, sir.

Q. When were you examined by him?

A. That was in June, 1944.

Q. 1944, within a few months after the accident?

A. Yes.

(Testimony of Charles Lee Trotter.)

Q. And he found you were also suffering from diseases not relating to any of your injuries?

A. He didn't tell me what his diagnosis were.

Q. But you learned since then that—you learned, and you took medicine for diseases not related to the injury at all?

A. I never took medicine for any diseases.

Q. Did you ascertain at that time you were suffering from prostatitis?

A. He didn't tell me.

Q. He didn't tell you? A. No.

Q. But if he says so, that must be the truth?

A. Well, he was the doctor.

Q. Yes, your own personal doctor?

A. Yes.

Q. You don't know how this truck came on the railroad tracks? A. I do not. [79]

Q. You know nothing about that?

A. I know nothing about that.

Q. By the way, Mr. Trotter, you also have an action pending in California, in the United States Court in California, have you not, for these same injuries?

Mr. Morgan: We object to that as wholly immaterial as to what other actions may be pending.

Mr. Struckmeyer: I think I can show the materiality of it, your Honor, inconsistent claims.

Mr. Morgan: It often happens that there are claims against different defendants.

The Court: Oh, he may answer.

(Testimony of Charles Lee Trotter.)

Mr. Struckmeyer: Q. You have an action pending in California, have you not?

A. Yes.

Q. And that is brought by the same attorneys who have brought this action, not just Morgan, but the other attorneys, being Hildebrand—

Mr. Morgan: We object to all this line of cross examination, it is improper cross examination.

Mr. Struckmeyer: Q. And in fact, in that complaint you allege, do you not, that the fault of this accident was the Railroad Company's fault?

Mr. Morgan: We object to that also as being [80] wholly irrelevant, incompetent and immaterial, and not tending to prove or disprove any issue in this case. If an action arises in regard to the negligence of two or more—

Mr. Struckmeyer: Q. You have a verified complaint here.

The Court: The pleadings are drawn by attorneys and not by the litigants.

Mr. Struckmeyer: Well, I am asking him personally.

Mr. Don Morgan: Can I ask him a question on voire dire?

The Court: Yes.

Mr. Don Morgan: Q. Did you, Mr. Trotter, actually sign this pleading that is referred to by counsel; did you sign and swear to it?

Mr. Struckmeyer: No, it is not so contended. It is verified by his attorney.

(Testimony of Charles Lee Trotter.)

The Court: He is not responsible for what his attorney does.

Mr. Struckmeyer: How is that?

The Court: You can't hold him accountable for what his attorney does, as far as the pleadings are concerned.

Mr. Struckmeyer: Q. You employed attorneys in California for the purpose of bringing an action [81] against the Railroad Company, did you not?

Mr. Don Morgan: We object to that as wholly immaterial.

The Court: I think you have pursued that far enough. It has been answered.

Mr. Struckmeyer: We offer in evidence, if the Court please, a certified copy of the complaint there filed.

Mr. J. H. Morgan: We object to it as wholly incompetent.

Mr. Struckmeyer: May it be marked for identification first?

The Court: Yes.

(The document was marked as Defendants' Exhibit A for identification.)

Mr. Struckmeyer: I think counsel are familiar with it.

The Court: I will sustain the objection on this.

Mr. Struckmeyer: We now offer to prove by this exhibit, then, that the plaintiff in this action has made inconsistent statements as to the cause of the accident, and offer it use it in impeachment

(Testimony of Charles Lee Trotter.)

as to the testimony here as to the cause of the accident.

The Court: Well, by the use of that pleading?

Mr. Struckmeyer: Yes.

The Court: Well, the pleadings were drawn by his counsel. How can you impeach a witness by what his counsel put in a complaint?

Mr. Struckmeyer: I understood that the Court had ruled—

The Court: Well, he said there was an action pending against the Railroad Company. Now, we will let it go at that. If it is a verified pleading, it would be different. Lawyers draw pleadings and their clients never see them.

Mr. Struckmeyer: One more question, your Honor please, in connection with that.

Q. Did your attorneys in California show you a copy of the complaint which had been filed?

A. A copy of what?

Q. A copy of the pleadings that had been filed.

A. No, they have not.

Q. They didn't, but you gave them an answer?

A. All that I had.

Mr. Struckmeyer: In view of the last answer, we renew the offering, if your Honor please.

Mr. J. H. Morgan: The same objection.

The Court: Yes, the objection is sustained.

Mr. Struckmeyer: Q. When did you first see the signal clear or yellow, or whatever you call [83] it, as you approached Kingman?

A. I saw the order board. It was clear.

(Testimony of Charles Lee Trotter.)

Q. Yellow? A. Green.

Q. Green. That was clear? A. Yes, sir.

Q. You didn't see the signal Mr. Rayburn was following? A. No.

Q. Did you see the signal? A. Yes, sir.

Mr. Struckmeyer: That is all.

Mr. Morgan: I believe that is all, Mr. Trotter.

(The witness was excused.)

Mr. Morgan: Mr. Rayburn.

JOHN S. RAYBURN

was called as a witness on behalf of the plaintiffs, and being first duly sworn, testified as follows:

Direct Examination

Mr. Morgan:

Q. What is your name, please?

A. John S. Rayburn.

Q. Where do you reside, Mr. Rayburn?

A. Needles, California. [84]

Q. Are you the John S. Rayburn who is named as the plaintiff in one of these complaints against the Lightning Delivery Company?

A. Yes, sir.

Q. How old are you at the present time?

A. I will be 51 this coming March.

Q. What was your age at the time of this accident? A. 47.

Q. By the way, at that time what was the state of your health on March 24th, 1944?

A. There was nothing wrong with it that I know of.

(Testimony of John S. Rayburn.)

Q. Had you ever been ill? A. No, sir.

Q. Suffered from no diseases up to that time?

A. No, sir.

Q. How long have you been in the railroad business?

A. I been in active service from November, 1916, until a year ago.

Q. Well, on March 24th you were an engineer, weren't you? A. Yes, sir.

Q. And on the 24th of that year; that is, the 24th of March, 1944, were you an engineer on one [85] of the westbound trains of the Santa Fe?

A. Yes, sir.

Q. On what train?

A. I was on the second engine of a second section of No. 3.

Q. What was your run, by the way?

A. What was my run?

Q. Yes, at that time.

A. I was on the freight pool service and used in extra passenger service.

Q. On this particular day? A. Yes, sir.

Q. Where did you get on; where did you take charge of this second section?

A. At Seligman, Arizona.

Q. And you were driving the train westward to— A. Needles.

Q. Needles. Do you recall that morning of March 24th, what train was preceding you on the track, or do you know? A. I don't know.

Q. You don't know that? A. No, sir.

(Testimony of John S. Rayburn.)

Q. Well, what time were you getting into Needles, I mean into Kingman? [86]

A. Well, we were running late and I don't remember what the orders were, whether we had any time or not.

Q. I don't mean that, I mean what was the actual time you were coming into Kingman, if you remember?

A. About the time we were coming into Kingman?

Q. Yes.

A. Around, oh, 1:20 in the morning.

Q. That was at nighttime, of course, in the morning, 1:20. You were on the second engine?

A. Yes, sir.

Q. Now, being on the second engine, did you have a full view of the tracks all the time, or just at certain times?

A. At a distance, yes, but my view was obscured by the lead engine.

Q. Who has control when there are two engines?

A. The lead engineer has charge of the air.

Q. The lead engineer has charge of the air and the speed, I presume?

A. Yes, sir.

Q. As he speeds up, you speed up the second engine?

A. Yes, sir.

Q. And he puts on the air and the brakes, is [87] that right?

A. Yes, sir.

Q. Will you tell the jury just briefly—I have to ask you to do that because you are familiar with

(Testimony of John S. Rayburn.)

the way the road comes into Kingman, will you tell the jury just how the railroad comes in?

A. Why, you drop down from Louisa Station east of Kingman, downhill and you are coming south and you make a curve to the west, and the lead engineer had made a reduction, I imagine, of 12 or 15 pounds to reduce the speed of the train, knowing that he had to make a station stop at Kingman, and approximately, oh, a mile east of Kingman station, my fireman hollered at me and told me there was a truck on the track, and I leaned out the window and saw it myself, and I come back in to cut into the emergency brake, and the lead engineer had already done so, exhausted his supply of air.

Q. The lead engineer put on the brakes then, or the air, before you had the opportunity?

A. Before I had the opportunity to do so.

Q. That was his duty to do so?

A. Yes, sir.

Q. The train then slowed down?

A. Yes, sir. [88]

Q. Did you continue to observe what was happening?

A. Yes, sir.

Q. All right, go right ahead and tell the jury.

A. Well, I knew we had struck this truck, it was still on the pilot of the engine, and shortly after that we were on the ground and the the engine was lurching and jumping up and down, and I was getting ready to unload; I was standing up with

(Testimony of John S. Rayburn.)

my knees against the window and my hands on the arm rest, and it threw me out.

Q. Do you remember which way it threw you?

A. Threw me out on my head and hands.

Q. I mean, to the right or left?

A. To the right.

Q. There is some buildings there, tool sheds, that you are doubtless familiar with?

A. Yes, sir.

Q. Do you know where it was about, where those tool sheds are?

A. When I came to, oh, a minute or so after I was thrown out of the cab window, why, I think I was by the tool house or where they keep the motor car.

Q. All right, tell the jury what injuries you suffered at that time—before that, let me [89] interrupt. About what height were you thrown, what distance from the cab, out of this window?

A. Approximately 15 to 16 feet from the cab to the ground.

Q. Now, will you please tell the jury what injuries you suffered?

A. Well, I received a concussion, a cut on my head, and both wrists broken, and my right shoulder, right hip and right ankle were badly bruised, and I was taken to the Mohave County Hospital and twelve hours later I was sent to the Los Angeles Hospital on some train that came through, and there I remained for about nine months and a half.

(Testimony of John S. Rayburn.)

Q. How many months?

A. About nine months and a half.

Q. In the hospital in Los Angeles?

A. In the hospital at Los Angeles.

Q. Now, in a general way, what treatments were being given you during that time?

A. Well, my arms were in a cast for six or seven weeks, and during the time I was in there, my right thigh filled up about the size of a football and they had to drain it several times, and then I had physiotherapy.

Q. What do you mean by physiotherapy?

A. Electrotherapy. That is, they had me put [90] my wrists in cold water and then in hot water for so many minutes, and then heat and massage, and then I don't remember, approximately nine months and a half, and I asked the doctor if I could come back to Needles and go to work, and he told me that if I thought I could work, it would be the patriotic thing to do, that they needed men badly, and I came back and I had to pass the book of rules examination which required a week or ten days to fill out and about 1200 questions and answered them orally, and I think I was off ten months and one week, and then I went back to work, and, of course, they had steam and Diesel power, and I couldn't work on steam. It bothered me so much for my injuries, so the local Chairman of the Engineers and also of the Firemen saw the management and they agreed to let me work on

(Testimony of John S. Rayburn.)

Diesels only, which I did do until I had a heart attack last November 4th.

Q. You were laid off for ten and one-half months?

A. Ten months and a week, I believe is correct.

Q. What wages were you making at the time of this accident?

A. At that time during the war the wages ran from six to seven hundred dollars a month, I would [91] say it was a fair average. You could work all that you could stand, and I would say probably six hundred dollars a month would be a fair estimate.

Q. From March 24th, 1944, until you went back to work some time in February, 1945, were you employed in any capacity whatsoever?

A. I don't understand that.

Q. That is, from the date of the accident, March 24th, 1944, until you went back to work, as you have already related, some time in February, 1945, were you employed in any way? A. No, sir.

Q. Nine and one-half months, I believe you said, you were in the hospital? A. Yes, sir.

Q. So that you lost at \$600 a month for that period? A. Approximately \$600 a month.

Q. Now, after you went back to work what were you able to earn?

A. Due to my injuries I could not work very regularly. Just as I felt. If I felt good, I worked, if I didn't, I didn't work.

(Testimony of John S. Rayburn.)

Q. What did you average during the time you did work? [92]

A. Oh, I would say I probably worked ten days a month, 200 to 250, somewhere in there.

Q. Then from February, 1945,—when did you get laid off finally by this heart attack?

A. Until November 4th last year.

Q. '46? A. '46.

Q. That would be how long a period, nearly two years—a year and a half? A. 15 months.

Q. About 21 months, practically 11 months in 1945, and nearly 10 months, or nine months in 1946?

A. I beg your pardon, I thought you were asking when I had this heart condition.

Q. Your heart condition occurred in November?

A. November 4th of last year.

Q. '46, in the year '46? A. Yes, sir.

Q. Since that time, of course, you have not worked, but up until that time you went back to work after this injury about February 1st, 1945, to November, 1946, that would be about 20 or 21 months, wouldn't it? A. Yes, sir.

Q. And what did you earn during that period, how much a month? [93]

A. Well, I haven't the exact figures with me, but I know that it would not run over 250 a month—from two to two-fifty.

Q. Your actual earnings? A. Yes, sir.

Q. If you had been able to work continuously and had not had those injuries, what would you have been able to earn during that period?

(Testimony of John S. Rayburn.)

A. From five to six hundred dollars a month.

Q. You lost around 300 a month?

A. Yes, sir.

Q. These injuries that you have related, did you suffer any pain? A. Yes, sir.

Q. In a general way, what is the character of the injuries?

A. Due to broken bones, I have been told by the doctor that I have an arthritic spine and that caused arthritis, and my hip bothers me, my right hip, and my back at the present time. My wrists are weak, they are sore all the time.

Q. Were both bones in each wrist broken?

A. Yes, sir.

Q. Do you know how long these wrists were kept in casts?

A. I believe that one, my left wrist was in a [94] cast for six weeks, and my right, seven, as I remember.

Q. You still have trouble with one of your hands?

A. My right wrist, yes, sir, more so than the other.

Q. I believe you don't claim your heart condition, that your doctor tells you your heart condition is not related to your injuries?

A. No, the doctor has not committed himself as to that.

Q. Your heart was all right, I take it, before, I think you answered that? A. Yes.

Q. You are a married man? A. Yes, sir.

(Testimony of John S. Rayburn.)

Q. At the present time what are you doing?

A. What am I doing?

Q. Yes.

A. I can't do anything, due to my heart condition. I am on a pension.

Q. How much is your pension?

A. It is \$87.09 a month.

Q. That is all?

A. I also draw \$60 a month from the Government as a World War I veteran. [95]

Mr. Morgan: I think that is all.

Cross Examination

Mr. Struckmeyer:

Q. You were engineer on the Santa Fe from 1916 on?

A. No, sir, I was promoted in 1922.

Q. Oh, I thought you said you worked as a railroad man since 1916.

A. Yes, sir, I did.

Q. For what railroad?

A. For the Santa Fe.

Q. And worked continuously from 1916 until the year—only a few months ago?

A. Yes, sir.

Q. During '16, '17, '18, '19, you worked for the Santa Fe?

A. No, I went in the Service in 1918.

Q. But you did not work continuously for the Santa Fe?

A. No, sir; not during the time I was in the Army.

(Testimony of John S. Rayburn.)

Q. Nine months you were in the Army. Did you sustain any disability? A. No, sir.

Q. Your compensation is what, disability [96] compensation?

A. It is on the World War.

Q. World War I? A. Veteran's pension.

Q. Disability pension?

A. Disability not incurred during the Service.

Q. Not Service connected disability?

A. No, sir; not Service connected.

Q. How long have you been receiving that?

A. Since the first of April of this year.

Q. Since the first of February of this year?

A. First of April of this year.

Q. Of this year. That was after your heart attack? A. Yes, sir.

Q. And you live where?

A. In Needles, California.

Q. You did for awhile stay in Sawtelle, did you not?

A. I was examined there by Government doctors. I had been sent there.

Q. Now, you said you first went in the hospital at Kingman? A. Yes, sir.

Q. And stayed there how long?

A. Approximately 12 hours. [97]

Q. And then you went to Needles?

A. No, sir; I was placed on a train and sent to the Santa Fe Hospital in Los Angeles.

Q. And stayed in the Santa Fe Hospital in Los Angeles how long?

(Testimony of John S. Rayburn.)

A. I believe about nine months and a half.

Q. You were there? A. Yes.

Q. And then did you go back to work immediately? A. No, sir.

Q. When did you go back to work?

A. The early part of February, some time the first part of February.

Q. '45? A. '45, yes, sir.

Q. Now, Mr. Rayburn, your deposition was taken in April, on the 3d day of April, 1945, was it not? A. I beg your pardon?

Q. Your deposition was taken—you testified—your deposition was taken, your testimony was taken in April, 1945, was it not?

A. I don't recall the date. I know it was shortly after I was in the hospital.

Q. And you remember the questions that were

A. Why, I believe that I do, I am not sure. [98]

Q. And this question was asked you—these depositions are sealed, may they be opened?

The Court: Yes.

Mr. Struckmeyer: Both of them. I want to read from the second last page—the third last page: I will read to you preliminary questions: "Question: Yes. You have been back to work? Answer: February the 1st of this year. Question: The same duties? Answer: Yes, sir." For your information, that related to your going back to work?

A. After I had left the hospital in Los Angeles. Some time the first part of February, I don't know the date.

(Testimony of John S. Rayburn.)

Q. And this question was asked you about your work: "Question: The same duties? Answer: Yes, sir." Did you make that answer?

A. To whom does that state I made that answer? I don't know of ever making it.

Q. The question was asked by me at the time—

Mr. Morgan: If the counsel will propound the questions and answers again, I think it will clarify it.

Mr. Struckmeyer: Well, I will read it again: "Question: And are able to perform those duties? Answer: I have been restricted to Diesel power [99] only on account of my injuries." Did you make that answer? A. Yes, sir.

Q. "Question: Receive the same pay as you did prior to the accident? Answer: Yes, sir." Was that question asked you? A. I don't remember.

Q. And did you make the following answer: "Answer: Yes, sir." A. I don't know.

Q. And this question: "Question: And doing the same work practically, except that you are restricted to Diesel power?" And did you make this answer: "Answer: Yes, sir."

A. I know that I was restricted to Diesel power, yes, sir.

Q. But you received the same pay, approximately the same pay as you had before?

A. Yes, sir.

Q. That is correct? Then, during that period that you worked from February 1st, 1945, up until

(Testimony of John S. Rayburn.)

your heart attack, you received approximately the same pay as you had received before?

A. The rate of pay is the same provided you are able to work.

Q. Did you keep a memorandum of the pay that [100] you received?

A. I didn't get your question.

Q. Did you keep a memorandum of the amount of pay you received?

A. All rail men get a copy of your time.

Q. Of your time, yes.

A. And your earnings.

Q. And also prepare income tax returns, did you? A. Yes, sir.

Q. Then you do know how much pay you received?

A. I couldn't quote you that figure, no, because I haven't it with me.

Q. You didn't bring it at all? A. No, sir.

Q. You saw the truck on the track about a mile from the station, is that correct?

A. Approximately a mile, yes.

Q. Approximately a mile?

A. I would imagine that is where I first saw it, somewhere in that vicinity?

Q. And your train at that time, you heard Mr. Trotter testify your train was going about 30 miles an hour?

A. I don't believe that it was that fast. I don't think so, as he had made a reduction in air [101]

(Testimony of John S. Rayburn.)
and reduced the speed of the train.

Q. You do believe that the engineer, the first engineer on the first train, he was going too fast, do you not?

A. No, sir; I don't think so. I knew he had to make a station stop and he had made a reduction of air and slowed the train down preparatory to that stop.

Q. You also filed a suit in California, did you not, against the Santa Fe Railroad Company?

Mr. Morgan: We object to that.

Mr. Struckmeyer: Growing out of these same injuries.

Mr. Morgan: We object to that for the same reason, that it would be no defense whatsoever in this case.

The Court: He may answer.

A. Hildebrand, Bills & McLeod has my case, and what action they have—

Mr. Struckmeyer: Q. But you do know they filed a suit in California, do you not?

A. Yes, sir.

Q. And that suit was filed with your knowledge? and consent? A. Yes, sir.

Q. And do you know on what grounds that suit [102] was based? A. No, sir.

Q. You do not?

A. I am not positive, no, sir.

Q. How is that?

A. I have not talked with the attorney concerning that case.

(Testimony of John S. Rayburn.)

Q. Not since then? A. No, sir.

Q. But you do know that that suit is still pending?

A. I knew that the suit had been filed, yes.

Mr. Struckmeyer: Your Honor please, we offer in evidence a certified copy of the complaint on the same grounds and for the same reason that was stated in the offer on the witness Trotter.

Mr. Morgan: We object to the introduction of that document in evidence for the reasons already stated in connection with the other offer.

The Court: The objection is sustained.

(The document was marked as Defendant's Exhibit D for identification.)

Mr. Struckmeyer: Q. Now, with reference to the questions on cross examination, may we read them in the deposition?

Mr. Morgan: Who answered them? [103]

Mr. Struckmeyer: He said he didn't know what he answered.

Mr. Morgan: Why, certainly.

Mr. Struckmeyer: Then it is stipulated that we may read from the deposition without now stopping—

Mr. Morgan: You have already read it.

Mr. Struckmeyer: Will you stipulate that those were the answers as read by me?

Mr. Morgan: Certainly, yes, yes, the ones you read.

Mr. Struckmeyer: That is all.

Mr. Morgan: Just a question or two.

(Testimony of John S. Rayburn.)

Redirect Examination

Mr. Morgan:

Q. In connection with the pay that you received after you went back to work on February 5th, 1945, you said that you received the same rate of pay. The pay that you received was so much for a trip, is that what you mean, the same rate?

A. The rate of pay is based upon so much a hundred miles, that is the way the roadmen are paid, and the Diesel pay and the steam engine pay is practically the same.

Q. That is on a hundred mile basis? [104]

A. On a hundred mile basis, or ability to work to make the mileage.

Q. So the total amount of your monthly pay would have to take into consideration the number of hours that you can make? A. Yes, sir.

Q. Now, in answer to my question, I think you stated you only made, from this period of February 1st until you were laid up with this heart attack, about \$250 a month, is that right?

A. Approximately, yes.

Q. How did you compute that; how did you arrive at that, that you were paid about \$250 a month during that period?

A. I know about how many trips—

Mr. Struckmeyer: If your Honor pleases—

The Court: He testified to that once, the witness has gone through that on direct examination before.

(Testimony of John S. Rayburn.)

Mr. Morgan: I thought he did, but I wasn't sure.

The Court: Well, I am, there is no need to repeat anything here.

Mr. Morgan: I don't think so except that counsel has brought it up. I believe that is all.

The Court: We will have our afternoon recess [105] at this time, gentlemen. Keep in mind the Court's admonition.

(Thereupon a short recess was taken.)

(After recess, all parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Stockmeyer: To save recalling the witnesses Rayburn and Trotter for one question, I think it is stipulated that no claims are made for hospital and medical expenses?

Mr. Morgan: Well, we make no claim in the pleadings, and we put in no proof.

Mr. Stockmeyer: All right.

The Court: All right.

Mr. Morgan: At this time, if the Court please, I would like to move to amend the complaint to conform with the proof in the following particulars: In the complaint in the Trotter case, Paragraph 9—

Mr. Struckmeyer: May I suggest that counsel type it overnight and we have it in the morning?

Mr. Morgan: It could be done by interlineation.

Mr. Struckmeyer: Oh, all right.

Mr. Morgan: Between the figures \$225 to \$250 per month, just to conform with the proof, \$450 a month. [106]

The Court: All right.

Mr. Morgan: We also reserve the right to allege in the complaint upon proof the reasonable amount of loss of wages or services, but I think that is unnecessary. If it is necessary, we move to amend Paragraph 9 by adding, by alleging that the reasonable value of Mr. Trotter's wages was \$7360, and in the Rayburn case we ask leave to amend the Rayburn complaint to conform with the complaint, or to conform with the proof, and be inserted in Paragraph 9, in lieu of \$500 a month, the figure of approximately \$600 per month, and by adding to Paragraph 9 of the complaint, that the reasonable value for the loss of Mr. Rayburn's wages was \$13,000, or is \$13,000.

The Court: All right. Call your next witness.

Mr. Morgan: We wish to put on the deposition of Dr. Lopizich. I think the original deposition is on file, is it not?

The Clerk: Yes.

Mr. Don Morgan: If the Court please, we would like to have Mr. Brobst to be the witness, and I will read the questions to him, and we get to Mr. Struckmeyer's questions, he will read his questions.

(Thereupon the deposition of Ival J. Lopizich taken in the case of Charles Lee Trotter versus [107] Lightning Delivery Company, et al., Civil 112, Prescott, commencing at 4:00 o'clock p.m., on

the 15th day of December, 1947, in the City of Los Angeles, California, was read.)

The Court: All right, now they have rested. Call your first witness or make your statement.

Mr. James Struckmeyer: We have a short motion at the present time, your Honor.

The Court: All right, do you want the jury to leave the courtroom?

Mr. Struckmeyer: No, I don't think so, I believe we can make it at the Judge's bench.

The Court: All right.

(Thereupon the following motion was made at the bench without the hearing of the jury:)

Mr. James Struckmeyer: Come now the defendants and move the Court that the Court do dismiss the action of the plaintiffs and direct a verdict in favor of the defendants, on the ground and for the reason that the plaintiffs have failed to establish any negligence whatsoever on the part of the defendants which would justify the jury in returning a verdict for the plaintiffs, and have failed to establish any act of negligence upon the part of the defendant in the operation or conduct of his trucks.

The Court: Is that all?

Mr. James Struckmeyer: That is all.

The Court: The motion is denied.

Mr. Struckmeyer, Sr.: I think we can save time by recessing until morning.

The Court: How can we save time?

Mr. Struckmeyer, Sr.: By getting our witnesses in shape and getting through, one, two, three.

Mr. James Struckmeyer: Let's go ahead.

The Court: All right, one half an hour.

DEFENDANTS' CASE

CHARLES W. DRYDEN

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer, Sr.:

Q. State your name, please.

A. Charles W. Dryden.

Q. What is your profession?

A. I am a civil engineer, Registered Civil Engineer.

Q. Practicing your profession in the State of Arizona? [109]

A. Yes, sir.

Q. At the request of Mr. Christensen did you make a map or drawing of Kingman, Arizona, where this accident occurred—you have been in the courtroom?

A. Yes.

Q. Where this accident occurred concerning which there has been testimony given here.

A. I did, right in the immediate local vicinity there.

Q. Have you such a map?

A. Yes, I have.

Mr. Struckmeyer. Will you produce it, please?

(Testimony of Charles W. Dryden.)

(The document was handed to Mr. Struckmeyer by the witness.)

Mr. Struckmeyer: Now, when was this map made?

A. It was made October 7th, 1944.

Q. And who was with you at the time you made it—did you take anybody's directions?

A. No, I made it under my own initiative at the request of Mr. Christensen.

Q. Yes.

A. And I believe that there was certain things that were to be shown, like the elevations, different elevations to be shown.

Q. State what that map shows, describe it in [110] general so that the jury may understand it.

A. Well—

Q. I will have it marked for identification and offer it.

Mr. J. H. Morgan: You are offering it?

Mr. Struckmeyer: I am offering it, yes.

Mr. J. H. Morgan: As an exhibit?

Mr. Struckmeyer: Exhibit C in evidence.

Mr. J. H. Morgan: When did you say this map was made? A. October, 1944.

Q. It was several months after the accident?

A. Yes.

Q. The various points that you have indicated on the map, such as where the truck was parked here, the point of collision, and so forth, were pointed out to you at that time?

(Testimony of Charles W. Dryden.)

A. They were pointed out to me at the time I made the map.

Q. Several months after the accident?

A. Several months after the accident.

Q. You don't mean by presenting this map that the truck was actually located where you say it was, but just simply where somebody told you?

A. Just simply information I obtained when I was making this survey indicating that point. [111]

Mr. J. H. Morgan: I think we will object to it because—on the ground that this simply shows what somebody pointed out to him at a much later date.

Mr. Struckmeyer: It is not primarily offered for that purpose. It is offered for the purpose of showing the grade, the location and the dimensions, your Honor, and the distances.

Mr. Morgan: Well, those he can testify to, use the map for that purpose, but not introduce it in evidence.

The Court: Well, any part of the map that is based on hearsay, of course, would not be admissible.

Mr. Struckmeyer: No, no, we don't offer that. These objects that are marked here were simply information which you received, and you do not vouch for their accuracy? A. No.

Mr. Struckmeyer: And this map does not pretend to.

The Court: Well, let him use it to illustrate his testimony, then, and we will get at it that way.

Mr. Struckmeyer: All right.

(Testimony of Charles W. Dryden.)

Q. Now, will you step down before the jury [112] and illustrate your testimony and the map itself from the map. You may step down.

Mr. Morgan: Is the map in now?

The Witness: This map shows the elevation of the railroad tracks—

Mr. Struckmeyer: Just a minute. To avoid any confusion, may the jury be instructed to disregard the map where the truck was parked. That is the only thing on there, your Honor, that is where the truck was supposed to have been parked.

The Court: That is the only thing based on hearsay?

Mr. Struckmeyer: That is the only thing based on hearsay, and the rest of it, all of this map was prepared by your actual measurements?

A. That is right.

Q. So far as the grades and distances are concerned? A. That is right.

Mr. Struckmeyer: All right, we offer it for that purpose only.

The Court: All right, it may be received.

(Thereupon the document was received as Defendants' Exhibit C in evidence.)

The Witness: Now, what particularly do you want me to show the jury? [113]

Mr. Struckmeyer: I want the measurements and the elevations, and referring to this place here where you were informed it was parked, why, that is not your evidence, that is merely for purposes of illustration.

(Testimony of Charles W. Dryden.)

A. That is right. Well, this cafe where the driver stopped is about 150 feet from this little filling station here, and then there is another, about 50 or 45 feet to the corner of this street where Seventh Street intersects with this Front Street, it is called over there. It is really U. S. Highway 66, and this area indicated, dotted in, is practically all level, it has all been graded down and oil surfaced. This runs about a hundred feet to the corner where that mark is there, 100.08 there, 101.25 there, and then at this corner of the building, 101.63, there is a little, slight slope that way, and right here immediately in front of the station it is about 100.98, almost 101 feet, and over here a little further, 101.42—

A Juror: Where is the cafe?

A. The cafe is in this block 13 there (indicating on map).

Mr. Struckmeyer: Just one question: So far as the location of the cafe is concerned, these [114] are actual measurements made by you?

A. That is right. Now, this elevation out here, coming down this street, starts at 101.15 down to 99.95, 97.92, and down here is where the streets intersect, that is 96.66, and coming down this way the ground falls off quite rapidly. Down the center of the street you see this 93.8 down here. That is a drop of almost three feet in about 75 or 80 feet, and coming down further down it is 91.49 and then 90.26. As you go this way it drops off quite rapidly and drops off this way (indicating on dia-

(Testimony of Charles W. Dryden.)

gram). On the railroad track down here the elevation is 89.06, which makes it about seven or almost twelve feet lower than this area in here. Then the elevation here between these tracks is steep, because the elevation is 88.46 in between here. On the track here, the center of it is 89.06, and then over here on this other rail, 89.14. This is fairly level between those spaces with a little swale in between, about a foot difference in elevation. From this point here to the filling station, it is 295 feet directly across, straight across. Is there anything else?

A Juror: What is the elevation of the cafe there? [115]

A. After you come up here, then this is all about the same, and the elevation at the corner of that building is 102.01, so it would be approximately 102. There is a right of way on U. S. Highway 66, 50 feet on each side of the center line. I notice there is a couple of encroaching structures here up on the highway right of way. Any questions on my answer?

A Juror: Could I see that?

(The witness hands the map to the juror.)

Mr. Struckmeyer: No further questions.

Cross Examination

Mr. J. H. Morgan:

Q. Will you please mark on your Sketch A at the corner of the cafe, the west front corner of the cafe that you have marked here?

A. Mark it "A"?

(Testimony of Charles W. Dryden.)

Q. Yes, just for use.

(The witness complies.)

Q. Now, will you mark a "B" which you have designated as the point of collision?

(The witness complies.)

Q. Now, with respect to the passing track, you were on the ground, I presume? A. Yes.

Q. That is the Santa Fe track which, the passing switch, the throw-off switch, where is that?

A. It is about in here (indicating on map).

Q. What would be the difference in the elevation from the point "A" which you have marked at the corner of the cafe, and point "B," the point of collision of the truck?

A. It would be 12.95 feet.

Q. Almost 13 feet? A. Almost 13 feet.

Q. What is the difference in the elevation from the corner of the, what you call the garage?

A. Yes.

Q. Is it a garage?

A. Yes, sir. This is the garage here, this is the cafe, and this is the filling station (indicating on map).

Q. The filling station is how many feet?

A. 11.92 feet.

Q. I notice you have a star mark down in front of this garage.

A. It indicates the position where I took the elevation.

Q. Oh, I see. Now, 50 feet on each side of the

(Testimony of Charles W. Dryden.)

center line which you have designated as [117] U. S. 66 would be about where on your map?

A. Right here (indicating).

Q. The line is shown——

A. The line is shown on both sides.

Q. Yes, sir. The paved portion doesn't go out?

A. No, the paved portion is narrower, much narrower than the 100 feet of right of way.

Q. You are familiar with the contour of the way the ground slopes and rolls? A. Yes.

Q. And went over it to that extent?

A. Yes.

Q. Now, if a car, a truck was parked somewhere in the vicinity of what we call the cafe here, which I presume you mean is Peggy's Cafe at that time?

A. Yes.

Q. Is parked there and got loose for some reason and started rolling, was headed west and started rolling down the hill, what way would it roll—would be likely to roll?

A. Well, the ground slopes this way and this way (indicating on diagram).

Q. Yes, sir.

A. Now, at the edge of this roadway here there is a little dip down where the storm water would normally drain, and right in here, of course, it is difficult for me to say which way it would roll, but probably would roll down this way, and as it came it would turn, gradually turned and came this way (indicating).

(Testimony of Charles W. Dryden.)

Q. Turned to the south?

A. Turned to the south, yes.

Q. Toward the railroad track?

A. That is a presumption on my part because I am just guessing that is the way it would do, because the hill slopes that way and slopes this way.

Q. From the corner of what is known as Peggy's Cafe to the point where you have marked the point of collision on the plat, what is the distance?

A. It is 295 feet from here to here, and from here it is 50—100—100 more feet. You see, these are each 50 foot lots, 50, 100 to that point, and approximately——

Q. Approximately 395 feet? A. 395 feet.

Q. And 13 feet higher? A. 13 feet higher.

Q. Handing you your plat again, Defendants' Exhibit C in evidence, I will ask you particularly concerning the ground in and around what you have [119] designated as the parking station, how does the ground there slope?

A. Well, it is very nearly level. It is 101.63, 101.42 and 100.98, 101.95. You see, it is all down-graded in there and it was surfaced. It is the driveway yard for the filling station and the property line is right along the front line of that gasoline——

Q. And right on the line of the right of way?

A. Yes.

Mr. Morgan: All right, I think that is all.

Mr. Struckmeyer: That is all.

(The witness was excused.)

The Court: We will suspend at this point until ten in the morning. Keep in mind the Court's admonition and be back at ten o'clock.

(Thereupon a recess was taken at 4:25 o'clock, p.m.) [120]

December 31, 1947, 10:00 o'clock a.m.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may call your next witness.

Mr. Struckmeyer, Sr.: Mr. Wilson.

CONDA WILSON

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer:

Q. Will you state your name, please?

A. Sir?

Q. Your name? A. Conda E. Wilson.

Q. Where do you live?

A. Flagstaff, Arizona.

Q. How long have you lived there—how long have you lived there? A. About 14 years.

Q. What is your vocation or business?

A. Sir?

Q. What has been your work? [121]

A. In Houston, Texas.

Q. No, what do you do for a living?

A. Oh, a truck driver.

(Testimony of Conda Wilson.)

Q. You have been a truck driver for how long?

A. About 15 years altogether—about 13 in Arizona.

Q. And by whom have you been employed the last few years?

A. I started out with the Lightning Delivery Company when I first come to Flagstaff.

Q. 14 years ago? A. Yes, sir.

Q. And have you been in their employ ever since?

A. Ever since. The Company kept changing hands and I went right with the Company.

Q. For the last seven years you have been employed by Frank Christensen?

A. I was about five years with Frank Christensen.

Q. Now, in March, 1944, particularly March 24th, you were working for Frank Christensen?

A. Yes, sir.

Q. On that date did you make any delivery of anything—what did you haul that day?

A. I was hauling sheep that day to Kingman.

Q. To Kingman? A. Yes, sir. [122]

Q. And from where?

A. From Cameron, Arizona.

Q. And there was an accident there that day. Now, without going into details of that accident, before you had completed your delivery—you had made your delivery of the sheep?

A. Yes, sir.

(Testimony of Conda Wilson.)

Q. And that was a little bit west of Kingman?

A. After I delivered my sheep I delivered about 12 miles on the other side of——

Q. Yes. What did you do after you delivered your sheep?

A. Back into Kingman about 12:30 or a quarter to one, and I was pulling in the east.

Q. You were going east then?

A. That is right.

Q. Going back where?

A. I turned around and headed back west and parked in front of the Associated Service Station.

Q. What were you going to do in Kingman that night?

A. I stayed there for about five minutes waiting for the other truck to come in, and when he come in, I walked across the highway and I talked to him a few minutes.

Q. Why did you stop in Kingman? [123]

A. About 12:45.

Q. Why? A. Why?

Q. Yes.

A. Well, we generally get a cup of coffee there and after we parked one truck he took my truck and went down town to get a bed.

Q. Then you were going to stay over that night?

A. Stay over night and go back the next day.

Q. Now, you have seen this map, have you, referring to Defendant's Exhibit No. C, referring to

(Testimony of Conda Wilson.)

this map, have you seen that map; did you look over that map? A. Yes, sir.

Q. All right. You were in the courtroom yesterday, were you? A. Yes, I was.

Q. When another witness drew a map on this board? A. Yes, sir.

Q. You could not hear the testimony very well, you were sitting——

A. I heard most of it, yes, sir.

Q. Referring to this diagram on the board here, is there any—you may step down if you wish to, or turn around. All right. This “B,” that is [124] Peggy’s Cafe? A. Yes, sir.

Q. And “A”? A. Is the garage.

Q. And this place over here?

A. That should be the service station.

Q. The service station? A. Yes, sir.

Q. Now, where were you parked there with reference to that service station?

A. Right in front of the gas pumps on the outside next to the highway, but there was a sign, there was in the distance between the highway and the pavement where you drive into the gas station. The reason I didn’t drive in the inside, there was a little roof over the inside of the plant and I couldn’t get in there with the semi, and I pulled over on the outside so the light will reflect down in my motor when I checked my oil.

Q. That is why you stopped there to check your oil?

(Testimony of Conda Wilson.)

A. Always check the oil and gas when you stop. That was the main reason.

Q. Then referring to this map, Exhibit C, can you point out there without paying any attention to this line here or this mark drawn on there, [125] without paying any attention to that, can you point out where you were parked?

A. Right there where the X is.

Q. Show it to the jury.

A. Right there where the X is. This is the roof over the front end of the service station out in the first part of the service station where you drive in under a pump. There was a gas pump right in here and I parked right next to it, to the outside gas pump.

Q. What were you going to do with your truck, were you going to leave it there for the night?

A. No. After we had a cup of coffee——

Q. Well, what were you going to do, were you going to leave it there? A. When I parked?

Q. Yes.

A. I stopped there to check my oil and tires before we left again.

Q. Was that a regular parking place for trucks or cars?

A. Yes, when they are gassing or checking oil or anything, yes, sir, that is what that place is for.

Q. Then what did you do after you did that, after you parked your car there? [126]

A. A. Well, I sat there and waited for the

other truck, because he was having troubles and I told him I would go on in and if he didn't come in within a certain length of time I would come and get him.

Q. Where had he been, west of Kingman?

A. No, he was unloading sheep too.

Q. I see. He had been with you unloading sheep?

A. Yes, sir. I passed him and come on into town.

Q. You waited there for him?

A. I waited there for him.

Q. What was his name?

A. His name was Leonard Gore.

Q. Now then, how soon did he drive up—how soon did he drive up after you parked there?

A. About five minutes.

Q. All right. Did you talk to him—don't state what he said, but did you talk to him there?

A. Yes.

Q. All right, then what did he do?

A. He checked his truck while I was waiting for him.

Q. At the service station?

A. No, sir, he was across the road, he was headed east. [127]

Q. Headed east. All right. Now, can you point to this diagram on the blackboard and state where he parked his truck?

A. He parked about right there on the right hand side of the highway going east (indicating).

(Testimony of Conda Wilson.)

Q. Will you put a mark there?

A. Yes, sir (complying).

Q. Mark that, just put an X there.

(The witness complies.)

Mr. Morgan: Well, in all fairness to the witness Mr. Struckmeyer, he is evidently confused with the diagram. He said it was on the right hand side of the highway going east.

Mr. Struckmeyer: That is correct.

Mr. Morgan: Well, he is on the left hand side of the highway going east.

The Witness: This is the highway, huh?

Mr. Struckmeyer: Yes.

Mr. Morgan: Yes.

Mr. Struckmeyer: That is right. Thank you. All right, you have marked that on the blackboard, the other truck? A. Yes, sir.

Q. Now, also on this map, Exhibit C, can you point out to the jury where he was parked, where he parked his truck? [128]

A. This is the highway, this is the highway, isn't it?

Mr. Struckmeyer: Yes, that is the highway.

Mr. Morgan: No, this is the center line.

Mr. Struckmeyer: That is the center line.

The Witness: Well, he was parked about right in here. There is the oil station, I mean, the place where—the oil plant over there, and he was parked between the highway and the oil plant, I'd say about, oh, 15 or 20 feet off the highway.

(Testimony of Conda Wilson.)

Q. Can you put that on the map there?

A. (Complying.)

Q. Now, in that—on the right—on the right there, you have drawn——

A. The other truck.

Q. The other truck. That is all marked there?

A. Yes, that is right.

Q. That is where he was parked?

A. Where he was parked.

Q. Then what did you do?

A. Why, after he got done checking his oil, we went into Peggy's Cafe, I think that is the name of it, got a cup of coffee and a piece of pie.

Q. Was the other driver, did he come in there too? [129]

A. Sir?

Q. The other driver, did he come in there too?

A. He went right in with me.

Q. Went in with you? A. Yes.

Q. How long did you stay there?

A. Well, about ten, between ten and fifteen minutes, not over fifteen minutes.

Q. Now, after you parked your truck what did you do with your truck?

A. First turned off the key, checked to see if it was in gear, had three gearshifts, had three gearshifts on it, I pulled on the air brake lever, had to use that to stop with, and then I checked to see if it was in gear and then pulled on my emergency brake and I sat and waited for the other truck.

(Testimony of Conda Wilson.)

Q. Was that all that you could do; did you do everything that you could do with the truck?

A. That is right.

Q. And that was the regular way of parking it?

A. That was the way I always parked my truck.

Q. Well, you have seen other truck drivers, you know that business, don't you? A. Sir?

Q. I say you know that business, the trucking business? [130] A. Yes, sir; I should.

Q. Now, could that car have moved away from there of its own motion, your truck?

A. No, sir.

Q. Could not?

A. Could not move without a push. It either have to be out of gear or the brakes off.

Q. You did everything that could be done, did you not, to make sure that it stayed there?

A. I did, all but getting out and hunting a rock to block the wheel.

Q. Yes. Then, go ahead from there when you were in the cafe, you were in there about ten or fifteen minutes? A. Right, sir.

Q. All right, then what did you do?

A. We started out back through the door and I looked over and a bus had pulled in the back of my truck, some bus from out at the airport, I looked around it and I said to the other boy, "Somebody stole my truck."

Q. The bus had pulled in behind your truck?

A. Yes, sir.

(Testimony of Conda Wilson.)

Q. That is, which way from your truck, east?

A. He come from the east, yes, sir. [131]

Q. And he pulled in behind your truck?

A. Right, sir.

Q. All right, then go ahead from there on.

A. I said, "Somebody stole my truck," and they said, "Oh." I said, "It isn't over there where I parked," so I thought maybe the service station man come in and wanted in the service station or something, and had moved it, so I walked around the side of the service station to see if my truck was parked any place on the other side and it wasn't parked there. By that time, Mr. Gore went some place across the highway and I turned around and started to come to the cafe to start the law—to tell them my truck was missing, and about the time I got to the door somebody else walked up and said to me that there was a train wreck, or looked like a train wreck, so I turned around and started towards the railroad to see what happened out there, and they had the engineer laying on the ground and was talking. Anyway, I asked what happened, and somebody said the passenger train hit a truck, so I walked around in front of the train and there lay my truck.

Q. What was said—did you examine it at the time?

A. I just looked in the—the door was open, I just looked in the door, that is all.

Q. The door was open?

(Testimony of Conda Wilson.)

A. On the right side. The impact probably knocked the door open. Maybe it was open otherwise, I don't know.

Q. You don't know how it opened?

A. I don't know how it was opened, but it was standing open.

Q. How about the gears, did you examine them at that time—did you examine the truck—about the gears?

A. All I looked at was the air brake and emergency, that is all. I didn't get close to it, they told me to stay away until the law looked it over.

Q. Do you know whether or not the emergency, the air brake had been released?

A. I could see—you mean do I know whether it had been released?

Q. Yes.

A. They was on anyway.

Q. When you parked it, but I mean afterwards.

A. I mean, when I looked in the door, when the door was open I could tell the emergency brake was pulled up and also the air lever down.

Q. Did you go back the next day? [133]

A. Back where?

Q. Did you stay there that night?

A. No, we had to stay there that night.

Q. Yes. Were you there the next day; did you examine—

A. After the law come and looked it over, I looked back in it, and the Brownie in the regular trans-

(Testimony of Conda Wilson.)

mission all seemed to be in gear when I looked at it the second time.

Q. Did you stay there—did you go over it with Mr. Christensen the next day?

A. Over where?

Q. Did you go over and see the truck again with Mr. Christensen the next day?

A. We stayed until they got the truck off the track and then I went home with Mr. Christensen. We went down first to the hotel and Mr. Gore called Mr. Christensen.

Q. That is what I mean, Mr. Christensen was not there at the time? A. No, sir.

Q. But he came? A. He was in Flagstaff.

Q. And he came right up? A. Yes, sir.

Q. I see. [134]

A. As soon as he was notified, he come right up. Mr. Struckmeyer: Cross examine.

Cross Examination

Mr. Brobst:

Q. Mr. Wilson, you state that you have been a truck driver for fifteen years?

A. Yes, sir; altogether.

Q. Now, the night that this accident happened, you did go into Peggy's Cafe and get a cup of coffee? A. What time?

Q. The night that the accident happened, you actually went into Peggy's Cafe and got a cup of coffee?

A. What happened, you mean? Or what time?

(Testimony of Conda Wilson.)

Q. You went into Peggy's Cafe and got some coffee, the night the accident happened?

A. Yes, sir.

Q. And the truck that was down on the railroad track when you got down there was the truck that you had parked, as you say, up at the service station?

A. That is right, sir.

Q. There is no question about that? [135]

A. Sir?

Q. There is no question but what it was so parked?

A. No, sir; it was the truck I was driving.

Q. Now, you had delivered your sheep and when you were on your way back to where, was it Flagstaff?

A. Yes, sir.

Q. And you planned to have coffee and then stay there at Kingman that night?

A. That is right.

Q. And you had brought someone back with you from—or someone had followed you, rather, in another truck, is that correct?

A. The other truck was following me, yes.

Q. What did you say that man's name was?

A. His name was Leonard Gore.

Q. All right. Now, when you stopped there at the service station, were the lights on, was it lit?

A. Was it what?

Q. Was it lit up; were the lights on in the service station?

A. No, sir; it was closed up.

Q. It was closed? A. Yes, sir. [136]

Q. I don't quite understand. You say you

(Testimony of Conda Wilson.)

stopped where there was a little gully so you could get under and look at the oil.

A. Well, the top light, that is on all the time in the service station.

Q. Was the top lighted when you parked?

A. Yes, the big light was on, the main street light.

Q. Now, as far as this diagram is concerned, would you just put an X so that we can all see it where you say that you parked your truck?

A. Is it all right to change this?

Q. No, don't change it, put an X—disregard those things.

A. (Complying): This is where my tractor was parked. This is the front end of the truck, the tractor part and trailer back through—back next to the opening between the two buildings.

Q. All right, I will mark these two small marks that you have here as W-1 on that diagram, and that indicates the way your tractors and trailer were parked?

A. Sir?

Q. That is the way your truck and trailer were parked?

A. It was headed west. [137]

Q. Headed west?

A. Yes, sir.

Q. Now, Mr. Wilson, when you parked it there you said you put it in gear?

A. Yes, sir.

Q. In what gear did you put it?

A. Well, the Eaton was in overdrive, and the Brownie, I believe, was in overdrive.

Q. They were both in forward overdrive?

A. Yes, sir.

(Testimony of Conda Wilson.)

Q. And you also removed the ignition key?

A. Pardon?

Q. You removed the ignition key, you removed the key from the ignition? A. No, sir.

Q. You left the key in?

A. I left the key in the ignition.

Q. You left the key in the ignition and you left it in gear? A. Yes, sir.

Q. All right. Now, Mr. Wilson, you left the key in the ignition and you left the gear in over-drive forward in gear? A. Yes, sir.

Q. And you left it parked so it was facing in a westerly direction. That highway slopes westerly [138] down towards Kingman on a grade—the highway slopes in a westerly direction towards Kingman? A. Yes, sir.

Q. Now, in addition to that you put on your air brake? A. Pulled on the air brake.

Q. You put on your air brake?

A. I set the air brake before I even tried anything else.

Q. Well, you set the air brake?

A. Yes, sir.

Q. And you pulled on the mechanical brake?

A. The emergency brake, yes, sir.

Q. Emergency brake, and that is all you did there, and those are all the things that you did, I want to get them all. You had the two gears in gear; you left the ignition key in?

A. Yes, sir.

Q. And you set the air brake?

(Testimony of Conda Wilson.)

A. Yes, sir.

Q. You set the mechanical brake?

A. Yes, sir.

Q. And then you left your truck?

A. No, sir.

Q. Well, what did you do after that?

A. I stayed in my truck for about five minutes
[139] waiting for the other truck.

Q. Then you got out and left it there?

A. Yes, sir.

Q. And that is all you did with reference to
parking your truck? A. Yes, sir.

Q. Then after you had had your coffee you came
out of the restaurant—after you had had your coffee
and pie you came out of the restaurant?

A. After I came out of the restaurant—did you
say after I came out of the restaurant?

Q. Yes, after you drank your coffee and after
you ate your pie, then you came out of the res-
taurant? A. Right, sir.

Q. When you came out of the restaurant you
discovered your truck was gone?

A. That is right, sir.

Q. And when you went down to the railroad
track—you later went down to the railroad track
and saw your truck? A. Yes, sir.

Mr. Brobst: All right, that is all. [140]

Redirect Examination

Mr. Struckmeyer:

Q. The fact that you are hard of hearing does
not interfere with your driving at all?

(Testimony of Conda Wilson.)

A. No, sir.

Q. Did you receive any medals for safe driving?

A. Yes, sir; I received a medal for three years' service—

Mr. Brobst: Object as immaterial.

Mr. Struckmeyer: It is only in view of his somewhat hard of hearing, your Honor please.

The Court: Well, that wouldn't affect one's skill as a driver.

Mr. Struckmeyer: All right.

Q. Now, is it usually customary for trucks after parking like that to leave the key in the—leave the keys in? A. Leave the keys in the car.

Q. Is it usual and customary for trucks?

A. Well, when you are just off for a couple of minutes we never bother taking the keys out of the ignition. We only figured on staying long enough to get coffee. I never take the keys out.

Q. Do other truck drivers take the keys out?

A. Everyone I have been with don't, just to get coffee. [141]

Q. I think I asked you before, from the way you parked your truck there it was impossible to move of its own motion unless somebody else had interfered with it? A. That is my belief.

Mr. Morgan: I object to the answer, your Honor. That is a matter for the jury to determine.

The Court: Yes.

Mr. Struckmeyer: All right, that is all—just one question—go ahead.

(Testimony of Conda Wilson.)

Recross Examination

Mr. Brobst:

Q. I will try once more, I just want one question, I want to mark on this map one that corresponded to this one. Where on this map would you say that your truck was parked?

A. Right there.

Q. Right where the X is here?

A. Yes, sir.

Q. Mr. Wilson, did you have a conversation with a police officer, a State Highway Patrolman, following the accident? A. Following what?

Q. After the accident, did you have a conversation with a police officer, a State Highway [142] Patrolman? A. Did I make—

Q. Did you have a conversation with a State Highway Patrolman after the accident?

A. Yes, sir, I made out my accident report.

Q. And at that time didn't you tell him that the reason that the truck got away was because the air brakes might have leaked? A. No, sir.

Q. You didn't tell him that? A. No, sir.

Q. And also isn't it a fact that you told him there that you weren't sure what gear you put the levers in?

A. That was only in one gear. I didn't know whether it was the regular transmission or in first or second gear.

Q. But you didn't tell him that the reason the truck got away was because the air brakes might have leaked? A. No, sir.

(Testimony of Conda Wilson.)

Mr. Brobst: All right, that is all, your Honor.

Redirect Examination

Mr. Struckmeyer:

Q. You had driven that day, I believe, from Cameron to Kingman? A. Yes, sir.

Q. And on very heavy grades?

A. Lots of heavy grades, yes, sir.

Q. And your air brakes on that day, they were tested, of course?

A. I had no trouble with my air brakes, never.

Q. They were in good condition?

A. No, sir.

Q. I say there were in good condition?

A. Yes, very good.

Recross Examination

Mr. Brobst:

Q. Do you recall what year this truck was made, what year model was this truck? A. Sir?

Q. What year model was this truck?

A. What year?

Q. Yes. A. I think it was '39.

Q. And how many miles had it been driven up to the time that this accident happened? [144]

A. That is hard to say.

Q. You don't know?

A. I have hauled to Kingman for over a month steady.

Q. You don't know the actual mileage of the speedometer? A. No, I don't.

Mr. Brobst: That is all.

(The witness was excused.)

Mr. Struckmeyer: Mr. Christensen.

FRANK L. CHRISTENSEN

was recalled as a witness in his own behalf, and having been duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer:

Q. Mr. Christensen, this truck that was involved in that accident, what make was it?

A. It was a Ford, what we call a built-up Ford, having had a heavy duty front end, Brownie-Eaton with Mercury motor, with 920 rear, $8\frac{1}{4}$ -20 in the front and 920 drive on the trailer.

Q. What condition was the truck in at the time?

A. At that time I don't know, but at the time that it left Flagstaff it was in perfect condition.

Q. That is what I mean, at the time it left Flagstaff.

A. Yes, sir.

Q. What condition was it?

A. Perfect condition.

Q. Do you know the mileage?

A. No, sir; I don't there is any truck driver knows the mileage on his trucks.

Q. You, yourself, are a truck driver?

A. Yes, sir.

Q. Have been for how many years?

A. Yes, sir—Oh, I started to drive in '16 and I am still driving; that is trucks and passenger cars both.

Q. Trucks and passengers?

A. Yes, sir.

(Testimony of Frank L. Christensen.)

Q. And was the truck—was that truck examined before it left Flagstaff?

A. Yes, sir; it was examined the afternoon before it left Flagstaff.

Q. By whom?

A. By Ed Babbitt Motor Company.

Q. That is the Babbitt Motor Company in Flagstaff?

A. Yes, sir.

Q. What condition was it then? [146]

A. It was checked. I just put a new motor in it and it was checked for brakes, air, and for any leaky gaskets or felts on wheels so it would affect the brakes, and we had the motor tuned up and had the brakes checked that afternoon before it left.

Q. Do you know the condition of the checking?

A. Yes, sir.

Q. And in what condition was it?

A. Well, just as good condition as a truck could be in.

Q. Now, you heard your driver testify about parking there?

A. Yes, sir.

Q. Is it the usual and customary manner of parking?

A. After unloading, yes, sir.

Q. After unloading, yes, yes. Now, something was said about leaving keys in the truck.

A. Yes, sir.

Q. What do you know about that?

A. Only this, that I have one 1940 Dodge, the one that was with this equipment, still in my service, and I don't think I could get the key out of it.

(Testimony of Frank L. Christensen.)

Q. Well, is it customary to leave the key in [147] the truck? A. Yes.

Q. You heard him testify about setting the brakes and everything that he did?

A. Yes, sir.

Q. Is it usual and a customary manner of doing, of parking a truck?

A. I think that is second nature with the truck driver.

Q. So that from your own knowledge of trucks, and this particular truck and driver, was there any way that that truck of its own motion, could move away from there?

A. Not a possible chance in the world.

Q. Unless there was some outside interference?

A. That is right.

Q. You never learned what that was?

A. No, sir.

Q. They telephoned you and you went there that night?

A. Yes, sir; they called me about, I think it was about a quarter to two. I left Flagstaff about 2:15. I was in Kingman between seven and seven-thirty.

Q. And you examined your truck the following day? [148] A. Yes, sir.

Q. In what condition did you find it with reference to the gear?

Mr. Morgan: Oh, if your Honor please, I think I will object to that, it is too remote, hasn't any bearing on it.

The Court: It might not be. Go ahead.

(Testimony of Frank L. Christensen.)

A. The transmission was locked, that is, the main transmission was locked in second gear. The other two gears were—I don't know whether the Brownlite—there was a three way Browning, I don't know whether it was in conventional or overdrive, because we could not move it in the Eaton or in overdrive.

Q. I will show you Plaintiffs' Exhibit 1, have you looked at that? A. Yes, sir.

Q. Now, what does that show with reference to the brakes?

A. It shows only the air brakes, the air brake level is down—the air brake level is right here, (indicating).

Q. And what does that mean; what does that signify? A. It means it was set.

Q. The air brake was set? [149]

A. Yes, sir.

Q. It was still set after the accident?

A. Yes, sir.

Q. And it was in that condition the following morning? A. Yes, sir.

Q. Would that truck, and I am speaking now from your own experience as a truck driver, owning your own trucks, if that truck, on its own motion, had moved, would it have been possible to come from that position where it was parked, down on the track?

A. I might answer you in this way, that I could not drive the truck through the direction that it went in daylight. I am not that good a driver.

(Testimony of Frank L. Christensen.)

Q. Well, what would have happened of its own motion?

A. Pulling into the track, the way it was explained to me, the way it was parked, and through—by my driver—the way the driver turned around and headed west, naturally, your truck, your wheels would have been turned to the right slightly, and if the truck would have rolled into the road or gone straight into the street across the service station—

Q. What would have happened?

A. You mean the way that the truck was parked according to my information?

Q. Yes. A. I don't know.

Q. What would have happened about jack-knifing?

A. Well, that is altogether possible that it could jack-knife, but I don't know that it was jack-knifed from where it was setting, from where I was told it was setting.

Mr. Struckmeyer: All right, cross-examine.

Cross-Examination

Mr. J. H. Morgan:

Q. What do you mean when you say you found the transmission locked in second gear?

A. I had instructions from the Santa Fe to move my truck off of the right of way, and I could not move it until we removed the rear axles. We couldn't even drag it, so we got in to see what was wrong, and I had a mechanic from the White Garage, I think it is the White Garage, it is below

(Testimony of Frank L. Christensen.)

the Beal Hotel, west from the Beal Hotel, come up and help me to see what was wrong, and he told me it was locked in second gear, and that is the first time I knew it. [151]

Q. By that you mean it was jacked up?

A. Jacked up, as it was sealed, it was locked in second gear.

Q. How long had this truck been operating?

A. The truck had been operating, I had owned it about six months, I think.

Q. What year was it?

A. It is—well, it is '41, but registered '40.

Q. Registered '40? A. Yes.

Q. Well, do you know approximately how many miles it ran? A. No, sir.

Q. A hundred thousand or better?

A. No sir, it could not.

Q. But it had operated, it ran rather consistently?

A. A truck will run an average of—my trucks run an average of 25,000 a year.

Q. Now, as I understand it, when you turned this truck over to Babbitt Brothers, they did the work on it? A. Yes, sir.

Q. You weren't there? A. Yes, sir.

Q. You didn't superintend the job? [152]

A. Yes, sir.

Q. You were right there when the work was being done? A. Yes, sir.

(Testimony of Frank L. Christensen.)

Q. Did you have some other particular duties to do?

A. Not that particular time, I only had two trucks.

Q. What was the purpose of turning it over to Dabbitt Brothers and going over there?

A. When I sold it I had my own mechanic that took care of my equipment, and at that particular time we was awful particular with mechanic—when we took a truck to the garage we was particular which mechanic worked on it.

Q. You didn't stay there all the time, did you?

A. Yes, sir; I did.

Q. You didn't work on the truck yourself?

A. No, sir.

Q. But you superintended that job. How long did it take?

A. I imagine it took about an hour and a half to check it.

Q. To check it? A. Yes, sir. [153]

Q. There was nothing done with the brakes?

A. Yes, sir.

Q. What was done with the brakes?

A. One rear wheel was pulled and a new gasket put in and the brake linings cleaned and washed.

Q. What else was done?

A. That is all, just checked the motor.

Q. Oh, I see, just a checking job?

A. That is right.

(Testimony of Frank L. Christensen.)

Q. I understood from your testimony you had an overhauling job?

A. No a new motor was put in a couple, three weeks before that.

Q. You saw the terrain around there where this accident occurred, you know the location of Peggy's Cafe; you know the location of the garages?

A. Approximately, yes, sir.

Q. Now, if I understand it, maybe I made a mistake, but it was your testimony from where your driver said this truck was parked, that you, yourself, could not possibly drive the truck down by the railroad track?

A. Not and get it in the position it was in, no, sir.

Q. Just couldn't be done?

A. I don't think so. [154]

Q. You could not have driven down there?

A. Not me. I could not have gotten over the tracks; I could not have gotten over the spur track that was in here. That was a raised track.

Q. That is, if you had to drive it from this point where your driver happened to leave it?

A. Yes, sir.

Q. All right. I think you are absolutely right. Now, Mr. Christensen, if this truck were parked up here at Peggy's Cafe?

A. Yes, sir.

Q. In the position indicated on this plat that I am pointing at here, could you, from that point, have driven the truck down onto the railroad track?

(Testimony of Frank L. Christensen.)

A. You mean described as this truck here?

Q. Yes. A. No, sir.

Q. Why not?

A. I could not have driven it—yes, if somebody had driven it, but that truck never would have moved more than 12 feet, because it would have jack-knifed the body against the cab.

Q. It could have been driven?

A. Oh, yes, it could have been driven.

Q. Even you could have driven it?

A. Oh, yes, even I could have driven it there.

Q. From that point? A. Yes, sir.

Q. Then, too, if it were parked in this manner and for some reason the brakes gave way, the brake leaked, or the car was parked in over-gear—there is such a thing as over-gear?

A. That is right.

Q. And only in high gear, and the brakes, for some reason, gave away, that could have rolled down hill?

A. I don't think so from this position, because there is a fence running here and it would have had to come down here and go across (indicating on diagram).

Q. There was no fence at that time.

A. Well, there is—it is not clear in my mind what the bulk plant is, but I think is the Shell Oil Company.

Q. I will show you a picture here—well, we will look at Defendant's Exhibit C for identification.

(Testimony of Frank L. Christensen.)

A. That map does not show the buildings along this spur here.

Q. All right. Will you mark this for identification, Plaintiff's Exhibit?

(The document was marked as Plaintiff's Exhibit [156] 9 for identification.)

Mr. Morgan: To refresh your recollection, Mr. Christensen, handing you Plaintiff's Exhibit 9 for identification, which I am advised is a photograph taken from the railroad track up toward these buildings shortly after the accident.

A. It was from about right here is the fence of the—I don't know if it is the bulk plant right here. This is Peggy's, and across the street from Peggy's is this Shell Service Station and this Associated Service Station is over on the left hand side.

Q. That is a fair representation of the situation as it existed there at that time, is it not?

A. Yes, I think so.

Q. Then between Peggy's Cafe and this railroad wreck that is shown on the photograph, there was no obstruction that would prevent this car from rolling down?

A. From its position up here?

Q. Yes.

A. Well, yes, there is poles in there and there is some piles of rubbish, the next morning when I got in there.

Q. Is it shown in this picture?

A. No, I don't—it is over in this way, Mr. [157] Morgan (indicating on exhibit).

(Testimony of Frank L. Christensen.)

Mr. Morgan: Well, we offer in evidence Plaintiffs' Exhibit 9.

(The document was received and marked as Plaintiffs' Exhibit 9 in evidence and handed to the jury.)

Mr. Morgan: Q. Well, summed up, as I understand from your testimony, that this car was actually parked as stated by Mr. Wilson down by this service station, and it would be impossible, as I understand from your testimony for the car to have rolled down on the railroad track at that point?

A. Of its own accord.

Q. The truck parked on the highway in front of the Associated Service Station, it would have been practically—it would have been impossible, as I understand your testimony, for that car to have rolled away down on the tracks?

A. I said I could not have put it down there.

Q. And you are an old driver, and could not have driven it from that position down on the tracks?

A. On the tracks it was on, no, sir.

Q. And if it had been parked up here at Peggy's Cafe, you, as a driver, could have driven it down?

A. I still could not have put it over on the one side where it went over, Mr. Morgan.

Q. Why?

A. Because it had saddle tanks on it and only six inch clearance.

Q. The truck was there?

(Testimony of Frank L. Christensen.)

A. I know it, it was there, but I said I could not have put it over there in daylight.

Q. The truck was there, it got there somehow.

A. That is right, it certainly was.

Q. And I believe you have admitted it was parked as indicated by Mr. Marbell on his plat there and the brakes for some reason had loosened and the car got away, and it could have rolled down the hill.

A. In the position in which Mr. Marbell set the truck?

Q. Well, approximately in that position.

A. No, sir, it could not have; it would jack-knife.

Q. What do you mean by "jack-knife"?

A. Because if it jack-knifed, it would have moved along this way and the semi would have pushed the trailer.

Q. That would depend, of course, on how the wheels of the truck were left? [159]

A. I might say all the information I had was where the truck was parked is what I heard Mr. Marbell say and my driver say. That, I don't know. I have confidence in my drivers.

Mr. Morgan: That is all.

Mr. Struckmeyer: That is all.

(The witness was excused.)

The Court: We will have our morning recess at this time. Keep in mind the Court's admonition.

(A short recess was thereupon taken.)

(After recess, all parties, as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

Mr. Struckmeyer: Mr. Gore.

LEONARD J. GORE

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer:

Q. State your name, please.

A. Leonard J. Gore.

Q. What is your business?

A. Truck driver and blade operator.

Q. How long have you been truck driver, how many years? A. About 14.

Q. In March, 1944, by whom were you employed? A. Frank L. Christensen.

Q. On that date what did you do; did you drive a truck? A. Yes, sir.

Q. What did you do?

A. Hauled sheep from Cameron to Kingman.

Q. And any other truck with you?

A. Yes, sir.

Q. Whose truck? A. Tex Wilson.

Q. You two drove together? A. Yes, sir.

(Testimony of Leonard J. Gore.)

Q. Followed each other? A. Yes, sir.

Q. You had unloaded your sheep immediately west of Kingman, or at Kingman?

A. West of Kingman.

Q. Yes, and then you two were together?

A. When we unloaded we were.

Q. Then what did you do?

A. We came back to Kingman, and I was having trouble with my truck, and Tex went on into Kingman with the understanding if I didn't come in in a [161] reasonable time, why, he would come back and get me.

Q. I see. All right. Now, did you get to Kingman? A. Yes, sir.

Q. And what time did you get there?

A. Some time after one. I don't know just exactly what time.

Q. Did you see Tex Wilson? A. Yes, sir.

Q. Where?

A. He was parked at the service station west of Peggy's Cafe.

Q. You have been in the courtroom, I believe?

A. Yes.

Q. You have gone over this map?

A. Yes, sir.

Q. When you got back to Kingman where was—where did you first see Wilson?

A. Setting by this service station with the hood up on the truck.

Q. What was the purpose of that?

(Testimony of Leonard J. Gore.)

A. Checking the oil.

Q. Now, on this map, Exhibit C, will you point out the place where he was parked? Step over here to the jury. [162]

(The witness complies and indicates on diagram).

Q. At the point marked X? A. Yes, sir.

Q. Indicated on the map? A. Yes, sir.

Q. All right, sit down. Then what did you do?

A. He came over to my truck when I parked. I pulled it up in front of the cafe. We nearly always had——

Q. Parking which way?

A. Parking, headed east.

Q. That is opposite the cafe?

A. Opposite the cafe.

Q. But on the other side?

A. On the other side of the highway, between the highway and some bulk plant, I don't know what the name of it was.

Q. And did you park your car there, or truck?

A. Yes, sir, and Tex came over to the truck and we went into the cafe and had a cup of coffee and a piece of pie.

Q. Now, in the meantime when he came over to your truck, where was his truck parked?

A. He left it at the service station.

Q. Right at the service station?

A. Right immediately in front of the gas pump.

Q. I see. Well, now, you have been in the court-

(Testimony of Leonard J. Gore.)

room and heard the manner in which he parked his truck? A. Yes, sir.

Q. How long have you been a truck driver?

A. 14 years or longer.

Q. You knew this particular truck?

A. Yes, sir.

Q. Was there anything that he could have done—~~you~~ heard his testimony—anything that he could have done to safeguard his truck from running away?

A. Not unless he put something under the wheel, and it wouldn't be necessary on that kind of ground. It was very near level.

Q. Where he was parked? A. Yes.

Q. And you heard him say that he left the keys in the truck?

A. The keys was still in the truck when it was wrecked.

Q. Is that the customary way of doing?

A. We always left the keys in them.

Q. Always leave the keys in your truck?

A. Yes.

Q. When you parked your truck what did you do with your keys? [164]

A. Left it in the truck.

Q. And you went in the cafe?

A. Yes, sir.

Q. Then state what happened.

A. Well, we was—well, we were eating in the

(Testimony of Leonard J. Gore.)

cafe and there were four soldier boys came in and one of them said to the other, said——

Mr. Don Morgan: I object, your Honor, hear-say.

Mr. Struckmeyer: Yes, I guess so. You can't tell what they said. Did anything arrest your attention in the cafe?

A. Just the soldier boys, what they had said.

Q. What was the subject of their conversaaion?

A. The train had hitten something.

Q. Then what did you do?

A. Well, when we left the cafe, Tex said, "Somebody stole my truck."

Q. Well, did you go over to the truck, to the place where his truck was parked, in that direction? A. Yes.

Q. All right, and could you see right over to the service station?

A. No, there was a bus in between the service station and the cafe where we were at.

Q. A bus? [165] A. Yes.

Q. It stopped behind his truck, that is where his truck——

A. Behind where his truck had been.

Q. Had been, yes. All right, then—go ahead and tell what you did then.

A. Well, as soon as he missed his truck, why, I knew right off the reel what had happened because of what the soldier had said.

Q. That is the first thing that you knew?

(Testimony of Leonard J. Gore.)

A. Yes, and I went straight down to where the passenger train was parked, and right on straight to the end of it, and there was the truck.

Q. And you saw the truck then?

A. Yes, sir.

Q. Now, you saw how that truck was parked there, how it had been parked? A. Yes.

Q. And you know—were you well acquainted with Kingman at that time?

A. Well, we had been hauling to there for quite some time.

Q. That is what I mean, yes, with the terrain, generally you were acquainted? A. Yes.

Q. Was there any possibility of that truck, the way it was parked there for itself to have become loose and move away of its own accord?

A. I don't see how.

Q. It could not?

A. I don't believe that it would have moved if it had not even been in gear, or anything, because the ground was too level there at that gas pump.

Q. Did you look at the truck afterwards, the truck afterwards? A. Yes, sir.

Q. After the accident?

A. Yes, sir. Frank and I went down the next day and hauled it to Phoenix.

Q. When you say "Frank", you mean Mr. Christensen? A. Yes.

Q. In what condition was it at that time; was it in gear or otherwise?

(Testimony of Leonard J. Gore.)

A. It was in gear. We had to take the axles out before we could move it.

Mr. Struckmeyer: Cross examine.

Cross Examination

Mr. J. H. Morgan:

Q. You have been in the trucking business how long? [167]

A. I have been driving 14 years or longer.

Q. And you were with Mr. Christensen for some years prior to this March 24th?

A. I don't recall just exactly how long, but a year or longer.

Q. What was the number of this truck that was in this accident? A. 15.

Q. What was your number? A. 8.

Q. 8? A. Yes.

Q. Your truck, you say, was parked opposite Peggy's Cafe pointed to the east. Mr. Wilson shows the location of your truck at about this point, which would be east of Peggy's Cafe and the south part of the right of way?

A. Well, I was about here, parked about approximately with the end of the trailer parallel with the east part of the building. In other words, straight on the line.

Q. Across the road?

A. Yes, and there was some bulk plants.

Q. Over on to the south?

A. Yes, beyond the highway.

Q. That is right, that is right, between the [168] railroad track and where your truck was parked?

(Testimony of Leonard J. Gore.)

A. Yes.

Q. Now, when you came by and saw Mr. Wilson in his truck, did I understand you to say he was at that time out looking at the oil?

A. No, he was in his truck, but the hood was still up.

Q. Oh, I see, he was actually sitting in the truck when you came by? A. Yes.

Q. Now, it is your testimony, I take it, from where the particular point where you say this truck was parked that it would not run away even if there was no brakes on it?

A. I don't think it would. It might would.

Q. If the truck had been parked up on the crest of the hill in the region where Peggy's Cafe is located, it could easily have run away if the brakes gave way, could it not?

A. Well, it is not very steep in there, because this is on the driveway in here, leveled off, just enough grade in it toward the road for the water to come—

Q. If it got a start it could have easily rolled down hill?

A. Not sitting in this position, it could not.

Q. Why not?

A. Well, the trailer would be the only thing that would push it and it would jack-knife it, wouldn't it?

Q. I don't know, depending on how the front wheels were sitting. If the front wheels were set to the south rather than twisted around to the right,

(Testimony of Leonard J. Gore.)

that is, toward the curb, I think you can be justified in saying that the trailer would push it so it would start, wouldn't you?

A. Well, I don't think so.

Q. Well, you are an old truck man? Now, if that truck was parked on that grade—you have seen that grade, you know that the crest of the grade is right opposite Peggy's Cafe and there is a pretty steep grade to the south and west, everybody has so testified?

A. Yes, but the road is very near level. This here half of the road slopes this way, and this half slopes that way.

Q. But it does—the terrain slopes to the west?

A. Yes, the highway.

Q. All right. Now, if this car was parked as indicated on this plat—this truck was parked as indicated on this plat, without brakes and [170] without brakes, it would—

A. It wasn't parked there.

Q. Well, I am asking this hypothetical question. Assuming that the wheels were not turned to the north—that is to the right, but were set straight ahead or to the left, the front wheels, then that truck could have run way, couldn't it, and down this way (indicating on map)?

A. Well, I don't know. Not very many things that is impossible, but it is impossible for the truck to be sitting there.

Q. Now, if the truck was in what is known as overdrive and merely in high gear of overdrive,

(Testimony of Leonard J. Gore.)

that would not hardly hold the truck, would it, on a steep grade if the air brakes didn't hold and the mechanical brakes didn't hold?

A. If the grade was steep enough it would not stay there, if it was in high gear.

Q. Especially if there was overdrive?

A. Well, that doesn't change the ratio of gears very much.

Q. You have been running up and down that railroad for some time prior to this, have you not, you and Mr. Wilson? A. Yes.

Q. You observed the traffic on the railroad?

A. No, I never.

Q. Well, you knew that in 1944 there were numerous trains running on that track, both east and west?

A. I knew at that time that there were lots of trains running all the time.

Q. Lots of trains, night trains?

A. Yes, sir.

Mr. Morgan: I believe that is all.

Redirect Examination

Mr. Struckmeyer:

Q. What do you mean by "jack-knifing"?

A. Well, the trailer—in other words, it is impossible for a trailer to roll on its own accord backwards because the trailer will not follow, and it will run around and get against the—anybody that has ever tried to back a trailer knows what I mean.

Q. Well, us lawyers maybe not, I don't know.

(Testimony of Leonard J. Gore.)

A. It would not have to be a semi-trailer, just any trailer. It is hard to back a trailer.

Q. How long did that truck stay there before you went into Peggy's; about how long?

A. Well, I don't know how long that Wilson had been there before I got there, but I know it [172] was there, oh, between eight, ten or twelve minutes, maybe fifteen.

Q. Well, it was under your observation?

A. Yes, sir; from the other side of the highway at my truck.

Mr. Struckmeyer: I think that is all.

Recross Examination

Mr. Morgan:

Q. What was wrong with your truck?

A. The radiator boiling.

Mr. Struckmeyer: Oh, just one question—pardon me.

Redirect Examination

Mr. Struckmeyer:

Q. Were you acquainted with this truck, this truck that Wilson was driving? A. Yes, sir.

Q. Had you driven it yourself?

A. Yes, sir.

Q. In what condition was that truck at that time; in what condition?

A. Fine condition, just as good as a new truck, brand new one.

Q. I mean the brakes and everything? [173]

A. Yes, sir.

Mr. Struckmeyer: All right, that is all.

Recross Examination

Mr. Morgan:

Q. Did you drive it that day? A. No, sir.

Q. You heard Mr. Christensen testify that some work was done on the truck, some kind of gasket in one of the brakes the day before. Do you know anything about that? A. No, sir, I didn't.

Q. When had you last driven that truck?

A. Well, before we started hauling sheep.

Q. Well, how long before March 24th, 1944?

A. I imagine two weeks.

Mr. Morgan: That is all.

Mr. Struckmeyer: You are not in the employ of Mr. Christensen now?

A. No, sir; I work for the Coconino Highway Department.

Q. And have not worked for him for some time past? A. No, sir.

(The witness was excused.) [174]

Mr. James Struckmeyer: Mr. Hubbard.

ELMER HUBBARD

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct Examination

Mr. James Struckmeyer:

Q. What is your name, sir?

A. Elmer Hubbard.

Q. Your occupation?

A. I run a refrigeration supply at Flagstaff.

(Testimony of Elmer Hubbard.)

Q. In Flagstaff? Yes, sir.

Q. Were you in Kingman on or about the 24th day of March, 1944? A. I was.

Q. Did you see a truck there belonging to Frank Christensen, a Lightning Delivery truck?

A. I saw the truck after the accident occurred, after it had been moved from the tracks.

Q. Yes. Did you inspect the truck, Mr. Hubbard, or look at it? A. Yes.

Q. Did you inspect the gearshift levers in the truck? [175] A. Yes, I did.

Q. In what condition were those gearshift levers?

A. I found the main gearshift, I imagine it was locked in gear, apparently locked in gear.

Q. Do you remember what gear?

A. No, I wouldn't know.

Q. Are you a trucker yourself? A. No.

Q. Do you know what an air brake is on a truck?

A. Well, I know the operate the brakes, but beyond that I haven't much information on it.

Q. Do you know where they are at?

A. No.

Q. Do you know any more about this accident at all, Mr. Hubbard, than you have testified?

A. That is all I know about it, excepting noise I heard.

Q. You heard a noise?

A. During the night, yes, it woke me up.

Q. You were in Kingman that night?

(Testimony of Elmer Hubbard.)

A. That is right.

Mr. Struckmeyer. I think that is all. [176]

Cross Examination

Mr. J. H. Morgan:

Q. Of course, you wouldn't know when it was put in gear?

A. No, I have no way of knowing?

Mr. Morgan: That is all.

(The witness was excused.)

Mr. James Struckmeyer: Mr. Fisher, please.

SIDNEY FISHER

was called as a witness on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination

Mr. Struckmeyer:

Q. What is your full name?

A. Sidney Fisher.

Q. Where do you live?

A. Flagstaff, Arizona.

Q. What is your occupation?

A. Civil engineer.

Q. Were you in Kingman March 24th, 1944?

A. Yes, I was.

Q. What was the occasion for being there?

A. Well, I was employed there at the time.

Q. Were you at or near the railroad depot in

[177] Kingman that night?

A. Yes, I was.

(Testimony of Sidney Fisher.)

Q. Will you tell the jury why?

A. Well, my wife phoned from Flagstaff that our son was coming through Kingman on a train—he was in the Air Corps, and that if I would go down to the station I might be able to see him for a few minutes, so I was down when—

Q. How long did you wait at the station?

A. Oh, probably a couple of hours. I stood around the station.

Q. You didn't know the schedule of this train?

A. No, I sure didn't.

Q. And did you see the first section of this train come in?

A. I don't believe it was the first section of this train. There was—I saw a train just ahead of this train that came in.

Q. Did you examine this train that came into the depot—did you examine that train looking for your boy?

A. Yes, I did. I walked the full length of the train looking in the windows to see if I could locate him and didn't see him, and walked back probably three or four car lengths towards the ticket office.

Q. And then was your attention directed to the second section of this train which was then outside of the yards?

A. Yes, it was. There was an Army officer that was trying to get on the train, and he and I had been talking there, and he walked up to the train with me and he said, "Well, there is another train

(Testimony of Sidney Fisher.)

right behind this one, and maybe he is on it," and he also hoped he could get on it.

Q. Then did you look to the east?

A. Yes, we stopped and he said, "We might as well stop here because it would save us walking back down again," and I stopped there and the first train pulled out, and it so happened my son was on it, in one of the rear cars, and I waved at him as he went by, and just waited there with the officer for the other train to—

Q. Tell the jury exactly what you saw about the section that was then coming in?

A. Well, we saw the other train coming and also saw something on the track. It amazed me, because there was no intersection there and the lights from the train, from the time it came around the bend, I think from the time the lights was lined up, that where we were standing we could see this object on the track. [179]

Q. Then what happened?

A. Well, the train just came on down and hit it.

Q. Did you hear the train apply the brakes?

A. No, sir, I didn't. It wasn't very far, but I am sure if it did, I didn't hear them. I am sure they applied them at the same time.

Q. You then walked to the—

A. Yes, I went on up to the—to where the accident happened.

Q. What did you see?

A. Well, I saw the truck there on the front end of the train; in fact, went up to the side of the

(Testimony of Sidney Fisher.)

train to see if anybody was injured, and one engine was leaning over on its—oh, the boiler, it wasn't on its side.

Q. Was the right door on the truck open when you walked up there?

A. Yes, the door on the truck was open; in fact, I thought there probably **would have been somebody** in it, you know. That is the first place I thought surely somebody was in that truck, and the door was open, but no one in it.

Q. Well, did you see anybody in or near the truck or leave it immediately before the accident?

A. I couldn't say there was anyone leaving. There was some people went away from the vicinity [180] of the accident down south.

Q. They were silhouetted against the light?

A. Against the light, yes. The officer made the remark, "Well, those people got out of the way."

Q. Pardon? A. Pardon me.

Q. Don't quote the officer. You say just before the accident?

A. Yes, before the train hit.

Mr. Struckmeyer: I think that is all.

Cross Examination

Mr. J. H. Morgan:

Q. You couldn't tell, of course, when you looked down that track, how far away the train was?

A. No, sir; I couldn't tell at night.

Q. There is a curve probably three-quarters of a mile east of Kingman?

A. Yes, there is a curve up there.

(Testimony of Sidney Fisher.)

Q. An outside curve, and then there is another curve between that main curve, a slight curve, you know that?

A. I am not too well acquainted with the line of track. I know there is quite a curve on east of Kingman. [181]

Q. While you were looking down that track, you say, and at the same time you saw this train, you saw this object on the track?

A. Well, when the lights lined up so it could show the object.

Q. Could you tell what it was?

A. No, sir; I couldn't tell then.

Q. How far away was it?

A. Oh, it was about six—five or six hundred feet, it just loomed up there.

Q. You saw nobody in the truck?

A. No, sir, I didn't see anybody in the truck.

Q. Saw nobody getting out of it?

A. Nobody getting out of it, no, sir.

Q. But after the accident, or about the time of the accident, you did see some—

A. It was just before it hit that—

Q. You saw some figures, you say?

A. Yes, sir.

Q. And they were over to the right of the track somewhere?

A. Yes, on the south side of the track.

Q. The other side of which track, the main track or the westbound?

A. Well, the tracks there.

(Testimony of Sidney Fisher.)

Q. They were clear south of all the tracks? [182]

A. They were in the light of the locomotive and about the same time I saw the object, I think they were getting out of the way of the train.

Q. You don't know whether they were railroad men who had been working around the—

A. No, I could not. There was a lot of people at that time.

Q. You don't know whether they were men or women?

A. No, sir.

Mr. Morgan: I believe that is all.

Redirect Examination

Mr. Struckmeyer:

Q. You couldn't see Peggy's Cafe from the depot, could you?

A. I don't believe you could. I don't know. Honestly, I never looked at Peggy's Cafe.

Q. You didn't see a truck coming down grade, did you?

A. No, no, I didn't see it.

Q. You didn't see it until it was on the track?

A. Until it was on the track, and the lights.

Mr. Struckmeyer: All right, that is all.

(the witness was excused.)

Mr. Struckmeyer: We wish to read into the [183] record the deposition of Charles Lee Trotter, from the deposition on file, if your Honor please, in this court, the deposition taken on the 3d day of April, 1945.

Mr. Morgan: Whose deposition?

Mr. Struckmeyer: Charles Lee Trotter. The

question: "When did you go back to work? Answer: The 9th of February. Question: Of this year? Answer: Yes, '45. Question: As watch? Answer: As a locomotive fireman. Question: Practically the same duties that you did before? Answer: Yes, only in passenger service. Question: Oh, I see, your pay is increased, then, more than you received on February 24th of last year? Answer: Well, about the same." Do you desire to read any other part?

Mr. Morgan: No.

Mr. Struckmeyer: On Page 10 of the deposition of Rayburn, taken on the 3d day of April, 1945.

Mr. Morgan: That was all read before?

Mr. Struckmeyer: No.

Mr. Morgan: It doesn't matter.

Mr. Struckmeyer: I read a part of it.

"Question: Yes. You have been back to work?

Answer: February the 1st of this year. Question: The same duties? Answer: Yes, sir. Question: [184] And are able to perform those duties? Answer: I have been restricted to Diesel power only, on account of my injuries. Question: Receive the same pay as you did prior to the accident, though? Answer: Yes, sir. Question: And doing the same work practically, except that you are restricted to Diesel power? Answer: Yes, sir."

Mr. Struckmeyer: That is all. If your Honor pleases, we again move the introduction of these two certified copies of the complaint in California, for the same reasons stated yesterday.

The Court: The motion is denied.

Mr. Struckmeyer: We rest.

PLAINTIFFS' REBUTTAL TESTIMONY

JOHN S. RAYBURN

was recalled as a witness in rebuttal for the plaintiffs, and being theretofore duly sworn, testified as follows:

Direct Examination

Mr. Don Morgan:

Q. You have heard a portion of your deposition just read to you—read to the Court by Mr. Struckmeyer? A. Yes, sir. [185]

Q. Now, when you say in that deposition in answer to this question: "I have been restricted to Diesel power only on account of my injuries," and this question: "Receive the same pay as you did prior to the accident, though? Answer: Yes, sir." Just exactly what did you mean by that, by that answer?

Mr. Struckmeyer: Your Honor please, to that we object as not being proper rebuttal. The language speaks for itself.

The Court: He was merely asking whether he made the statement, that was the only issue, whether he had or whether he had not.

Mr. Struckmeyer: Yes, that should be limited.

Mr. Don Morgan: Your Honor, I believe he is entitled to explain any answer that is given.

The Court: The question is whether he made the answer, not what he meant.

Mr. Don Morgan: Very well, I believe it has been explained. That is all.

(The witness was excused.)

Mr. J. H. Morgan: Mr. Marbell. [186]

SAM MARBELL

resumed the witness stand and testified on behalf of the plaintiffs on rebuttal as follows:

Direct Examination

Mr. J. H. Morgan:

Q. Did you have a conversation with Mr. Wilson, the driver of the truck involved in this accident the morning of the accident? A. I did.

Q. Where did that occur?

A. At the scene, or near the scene of the accident.

Q. Who was present besides Mr. Wilson and yourself?

A. I believe Mr. Willis, the patrolman at that time, Willis.

Q. What, if any, explanation did he make, statement did he make pertaining to the truck running away?

Mr. Struckmeyer, Sr.: Your Honor please, I object to the form of the question, what explanation; generalities.

Mr. Morgan: Q. Did he at that time state to you in the presence of Mr. Willis that the truck ran away because the air brakes leaked, or words to that effect? A. He did.

Mr. Struckmeyer, Sr.: That is objected to, if the Court please, on the ground just mentioned. He might ask what did he say.

The Court: All right, what did he say at that conversation?

(Testimony of Sam Marbell.)

A. The driver stated that the only reason he could find for it getting away was the fact that he lost his air.

Mr. Morgan: Q. During your talks with Mr. Wilson while you were investigating the event that morning, did he state at any time that he was parked in front of this service station?

A. He did not.

Q. What, if any, statement did he make to you as to where he was parked?

A. The general idea, including his own, was that he was parked up in the vicinity of the cafe.

Q. That is Peggy's Cafe?

A. That is right.

Q. Was there any suggestions made by Mr. Wilson or anyone else at the time you were making this investigation, that somebody might have gotten in the truck and driven it away? A. No, sir.

Q. At the time you examined the truck are you able to say whether or not the ignition keys were in the truck?

A. I can't say; I didn't notice.

Mr. Morgan: I believe that is all. Take the witness.

Cross-Examination

Mr. Struckmeyer, Sr.:

Q. Have you been able to obtain your notes since yesterday? A. Beg pardon?

Q. Have you made an effort to obtain your notes since yesterday? A. I have not.

Q. The notes you took at the time?

(Testimony of Sam Marbell.)

A. I took notes at the time.

Q. Where are they?

A. They have been destroyed possibly two years ago.

Q. By whom? A. By me.

Q. They were turned into the Highway Department, were they not?

A. They were not. If the Court please, I'd like to explain why. [189]

The Court: I think you said the other officer made the report yesterday.

Mr. Struckmeyer: Yesterday he stated that, yes. As a matter of fact, Mr. Marbell, you tried to get the driver to admit that he left his car without brakes? A. I did not.

Q. You stated yesterday that if the car was parked here, up here in front of that service station, it could not have gotten away, rolled away.

A. To that point, yes.

Q. And you still say that?

A. That is right.

Q. Unless there was outside interference from that point, from that point, yes.

A. To where the accident occurred, it would be practically impossible for the truck to run unattended.

Q. Unattended? A. Yes.

Q. It would have jack-knifed?

A. I don't know.

Q. If it moved at all?

A. I never have pictured the truck parked in

(Testimony of Sam Marbell.)

that position, I haven't considered what it might do. [190]

Q. I see, but it could not, from that position, if it was parked there, it could not, of its own power or on its own motion have run away?

A. That is correct.

Mr. Struckmeyer: That is correct. That is all.

Redirect Examination

Mr. Morgan:

Q. You wish to make an explanation about the destruction of those notes of yours? Go ahead and make it.

A. The general procedure, when there is more than one officer investigating an accident is, that one submits the reports to the Highway Department to avoid repetition, which it would be. However, both, and all of the officers on duty and on the investigation compare notes and compiled the report, and one officer made the report out, but the only notes I had left, I had only the notes that I made, and had, were my work sheets that were made at the scene of the accident, and after taking the information off of those and passing them on for the report, I had no more use for the notes.

Mr. Morgan: That is all.

Mr. Struckmeyer: That is all.

(The witness was excused.) [191]

Mr. Morgan: The plaintiffs rest.

The Court: Do you have anything further?

Mr. Struckmeyer: No, your Honor.

The Court: We will suspend until ten o'clock

Friday morning. Keep in mind the court's admonition.

(Thereupon a recess was taken at 11:50 o'clock a.m. of the same day.)

10 o'clock a.m., all parties as heretofore noted by the clerk's record being present, the trial resumed, as follows:

Mr. Struckmeyer, Sr.: If the court please, we renew our motion for an instructed verdict.

The Court: The motion is denied. You may proceed with your argument, gentlemen.

(Whereupon, counsel for both sides presented their closing arguments to the jury, after which a recess was taken until 2 o'clock p.m.)

2 o'clock p.m. of the same day, all parties noted by the clerk's record being present, the trial resumed, as follows: [192]

THE COURT'S CHARGE TO THE JURY:

The Court: It now becomes the Court's duty, gentlemen, to instruct you as to the law that applies to this particular case.

The issues, briefly, in the two cases on trial here are as follows:

The plaintiffs Rayburn and Trotter were engineer and fireman respectively on a locomotive owned by the Atchison, Topeka & Santa Fe Railway Company. Plaintiffs claim that while they were operating said locomotive in the railroad yards at Kingman, Arizona, it collided with a truck owned by the

defendant Frank L. Christensen; that said truck had been negligently and carelessly parked by defendants above the tracks of the Railroad Company, and was suddenly caused to run driverless away into the railroad tracks. That the locomotive was derailed and plaintiffs were injured and suffered damages as set out in their pleadings. The defendant denies generally the claims of the plaintiffs.

Now, negligence is the omission to do something which a reasonably prudent person would have done under the circumstances, or the doing of something which such a person would not have done under the [193] same conditions. It is not absolute or intrinsic, but is always relative to some circumstances of time, place or person.

By "ordinary care" is meant that degree of care which an ordinarily careful and prudent person would have exercised under the same or similar circumstances; and the failure upon the part of any person or corporation to exercise that degree of care is negligence.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injuries. It may operate directly or through intermediate agencies or through conditions created by such agencies.

This does not mean that the law seeks and recog-

nizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in [194] law as a proximate cause.

I instruct you that the laws of Arizona, Section 66-118, A.P.A. 1939, provide:

“No person having control or charge of a motor vehicle shall allow it to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor, and when standing upon any grade without turning the front wheels to the curb or side of the driveway.”

If you should find from the evidence in this case that C. E. Wilson, the driver of the truck involved in this accident, failed to comply with the provisions of the section just read to you and that he left said truck unattended, without first effectively setting the brakes thereon, or without turning the front wheels to the curb or side of the roadway, you are instructed that such failure constitutes negligence as a matter of law.

However, in this action, a violation of this law would not be of any consequence unless it was the proximate cause or contributed in some degree as a proximate cause to the injuries found by you to have been suffered by the plaintiffs, or either of them, in the event you so find they have suffered injuries.

It is the universal rule that when an agent [195] is acting in the due course of his duties, that any act performed by the agent within the scope of his duty is binding upon his employer. So, in this case, if you find that the agent, the driver, C. E. Wilson, was guilty of negligence and carelessness, as alleged in the complaint, then such carelessness or negligence will be attributable to his employer, the defendant, and the defendant would be liable for the neglect of said agent.

From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiffs. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on his part.

The instruction just given may appear to constitute an exception to the general rule, that [196] the mere happening of an accident does not support an inference of negligence. The instruction, however, is based on a special doctrine of the law which may be applied only under special circumstances, they being as follows:

First: The fact that some certain instrumentality, by which injury to the plaintiffs was proximately caused, was in the possession and under the exclusive control of the defendant at the time the cause of injury was set in motion, it appearing on the face of the event that the injury was caused by some act or omission incident to defendant's management.

Second: The fact that the accident was one of such nature as does not happen in the ordinary course of things, if those who have control of the instrumentality use ordinary care.

Third: The fact that the circumstances surrounding the causing of the accident were such that the plaintiffs were not in a position to know what specific conduct was the cause, whereas, the one in charge of the instrumentality may reasonably be expected to know and be able to explain the precise cause of the accident.

When all these conditions are found to have existed, the inference of negligence to which they [197] give birth will support a verdict for the plaintiffs in the absence of a showing by the defendant that offsets the inference.

In civil cases, a preponderance of the evidence is required, and by a "preponderance of the evidence" is meant such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability is in favor of the party upon whom the burden rests.

While it is incumbent on the plaintiffs to prove their case by a preponderance of the evidence, the

law does not require of the plaintiffs' proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiffs to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.

If any allegations of the complaints herein are admitted as true by the answer of the defendant, then in your deliberation you must proceed upon the theory that such allegations of such complaints, for all purposes in the case, as true.

If you find that the plaintiffs are entitled [198] to recover, you may award them such damages, within the amount claimed, as within your opinion will compensate them for the pecuniary damages proved to have been sustained by them, and approximately caused them by the wrong complained of. And, in estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the nature, extent and severity of their injury or injuries, if any, the extent, degree and character of suffering, mental or physical, if any, its duration and its severity, and the loss of time and value thereof, and the loss of earning capacity.

You may also consider whether the injury was temporary in its nature, or is permanent in its character, and from all these elements, you will resolve what sum will fairly compensate the plaintiffs for the injuries sustained.

If you find that the plaintiffs are entitled to re-

cover, the measure of their recovery is what is denominated compensatory damages; that is, such sum as will compensate them for the injuries they have sustained.

If from the evidence in the case, and under the instructions, you find the issues for the plaintiffs, then in order to enable you to estimate [199] the amount of such damages as you may allow for pain and suffering, it is not necessary that any of the witnesses should have expressed an opinion as to the amount of such damages, if any; you may estimate such damages from the facts and circumstances and evidence, and by considering them in connection with your own knowledge and experience in the affairs of life. With regard to pain and suffering, the law prescribes no definite measure of damages, but leaves such damages to be fixed by you as your discretion dictates and as under all the circumstances may be just, reasonable and proper, not exceeding the amount prayed for in the complaint.

If you believe from the evidence that the driver of the truck in question exercised ordinary and reasonable care in parking the truck, and that he took such steps as an ordinary and reasonably prudent person would take to safeguard the said truck against moving, then in that event you shall return a verdict for the defendants.

I further charge you that if the defendants, acting through the driver of his truck, exercised reasonable and ordinary care as I heretofore defined to you, in the parking of the truck, and though said

truck thereafter, through external [200] cause not shown by the evidence, came to rest on the tracks of the Santa Fe Railway Company, then it is your duty to find a verdict for the defendant. In other words, it is not the duty of the defendants to explain or show the reason why their truck came upon the tracks of the Santa Fe Railway Company, but it is the duty of the plaintiffs to prove by a preponderance of the evidence that this truck came upon the track of the Santa Fe Railway Company through the negligence of the defendant.

In judging of the evidence in this case, gentlemen, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply strange construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his [201] character for truth, honesty and integrity, or his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the manner in which he might be affected by the verdicts, and the extent to which he is contracted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

There is nothing peculiarly different in the way a jury is to consider the proof in a civil case from that by which men give their attention to any question depending upon evidence presented [202] to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment.

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to consult with one another in the jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which

was ordered stricken out, must be wholly left out of account and disregarded. The opinion of the Judge on any issue in the case, if directly or inferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury, for to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions.

After you retire to your juryroom you will select one of your number to act as foreman and [203] proceed with your deliberations. Forms of verdict have been prepared for your guidance. They are both the same; that is, there is one for each plaintiff, there being two actions. I will read first: "John S. Rayburn, plaintiff, against Frank L. Christensen, doing business as Lightning Delivery Company.

"We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiff, John S. Rayburn, and assess his damages at blank dollars."

You will use that form of verdict in the event you find for the plaintiff, John S. Rayburn.

The other, in the same case, omitting the title of the Court and cause—"We, the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find for the plaintiff, Charles Lee Trotter, and assess his damages at blank dollars."

As I said, after you have agreed upon a verdict or verdicts, in the event you do agree, you will have the forms of verdict agreed upon signed by your foreman and return it to open court. Any verdict

agreed upon, of course, must be the unanimous verdict of the jury.

You may retire now in the custody of the [204] bailiffs.

(Thereupon the jury retired from the courtroom at 3:45 o'clock, p.m., of the same day to deliberate on their verdicts.)

The Court: Any exceptions to the instructions?

Mr. James Struckmeyer: The defendant excepts to the giving of plaintiffs' substituted instruction No. 8, on the grounds and for the reasons that the said instruction is not applicable to the fact situation herein; said instruction contains an incorrect statement of the law, and that the said instruction puts before the jury factors which are not present in this case.

Mr. Struckmeyer, Sr.: May we note an exception to plaintiffs' Instruction No. 6, for the reason that there is no evidence to support the giving of such instruction.

Mr. James Struckmeyer: The defendants object to the Court's refusal to give defendants' Instruction No. 2 on the ground that it is reasonably the fact situation in this case, and the same is a correct statement of the law, and the Court's refusal to give the instruction is prejudicial under the circumstances.

The defendant objects to Plaintiff's 5 and 6, on the ground that the evidence shows [205] that the truck in question was not parked upon a public highway, and that the laws of the State of Arizona are only applicable to the public highways. [206]

I hereby certify that the proceedings had upon the aforementioned trial are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 206 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,
Official Reporter.

United States of America,
District of Arizona—ss:

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing and attached is the original of the reporter's transcript filed May 24, 1948, in cases Nos. Civ.-111 Prescott, John H. Rayburn vs. Frank L. Christensen, doing business as Lightning Delivery Co., and Civ.-112 Prescott, Charles Lee Trotter vs. Frank L. Christensen, doing business as Lightning Delivery Co., and the same is hereby certified as a part of the record on appeal in said cases.

Witness my hand and the seal of said court this 22nd day of June, 1948.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: Filed May 24, 1948.

[Endorsed]: No. 11964. United States Circuit Court of Appeals for the Ninth Circuit. Frank L. Christensen, Appellant, vs. Charles Lee Trotter and John S. Rayburn, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 2, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11964

FRANK L. CHRISTENSEN,

Appellant,

vs.

JOHN S. RAYBURN,

Appellee.

and

FRANK L. CHRISTENSEN,

Appellant,

vs.

CHARLES LEE TROTTER,

Appellee.

STATEMENT OF POINTS TO BE RELIED ON

The appellant will rely on the following matters:

1. That defendant's Exhibit "A", marked for identification, should have been admitted in evidence as a contradictory statement or an admission against interest.

2. That the trial court committed error in its instructions to the jury in that the said instructions prejudicially assumed facts not in evidence.

3. That the doctrine of *res ipsa loquitur* could not be applied under the evidence.

4. That the evidence not only failed to show negligence upon the part of the appellees, but affirma-

tively showed that the act of an independent agency operating without negligence upon the part of the appellant was the sole and proximate cause of the accident complained of.

STRUCKMEYER &
STRUCKMEYER,

By /s/ F. C. STRUCKMEYER,
Attorneys for Appellant.

[Endorsed]: Filed July 12, 1948. Paul P. O'Brien,
Clerk.

